(1)

No. 00-8452-CSY
Status: GRANTED
CAPITAL CASE

Title: Daryl Renard Atkins, Petitioner
v.
Virginia

Docketed:
February 6, 2001

Court: Supreme Court of Virginia

Counsel for petitioner: Lee,Robert E.

Counsel for respondent: Rumpz,Pamela A.

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Entry	Date	Note	Proceedings and Orders
1	Feb 1 2001	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 8, 2001)
3	Mar 8 2001		Brief of respondent Virginia in opposition filed.
4	Mar 14 2001		Reply brief of petitioner Daryl R. Atkins filed.
5	Mar 22 2001		DISTRIBUTED. April 13, 2001 (Page 7)
6	Mar 29 2001	X	Supplemental brief of petitioner Daryl R. Atkins filed.
7	Apr 4 2001	X	Supplemental brief of respondent Virginia filed.
8	Apr 10 2001	X	Supplemental brief of petitioner Daryl R. Atkins (Second Supplement) filed.
9	Sep 17 2001		REDISTRIBUTED. September 24, 2001 (Page 126)
11	Sep 25 2001		Petition GRANTED. SET FOR ARGUMENT February 20, 2002. **********
12	Oct 3 2001	D	Motion of respondent to dismiss the writ of certiorari as improvidently granted filed.
13	Oct 5 2001		Response to motion of respondent to dismiss requested. Due, close of business, October 15, 2001.
14	Oct 15 2001		Brief of petitioner in reply to respondent's motion to dismiss the writ of certiorari as improvidently granted filed.
15	Oct 22 2001		Motion DISTRIBUTED. October 26, 2001 (Page 30)
16	Oct 29 2001		Motion of respondent to dismiss the writ of certiorari as improvidently granted DENIED.
17	Nov 6 2001		Order extending time to file the joint appendix and petitioner's brief on the merits to and including November 30, 2001. Order extending time to file respondent's brief on the merits to and including January 14, 2002.
18	Nov 19 2001	G	Motion of amici filers in No. 00-8727, McCarver v. North Carolina, to have their amici curiae briefs considered in support of petitioner in this case filed.
21	Nov 29 2001		Brief of petitioner Daryl Renard Atkins filed.
22	Nov 29 2001		Joint appendix filed.
23	Nov 29 2001		* Joint appendix in three volumes
24	Nov 29 2001		LODGING consisting of twenty bound copies of photographs from the ATM, referred to in the joint appendix,
19	Nov 30 2001		Motion of amici filers in No. 00-8727, McCarver v. North Carolina, to have their amicic briefs considered in support of petitioner in this case DISTRIBUTED.

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No. 00-8452-CSY

Entry	Date	Note	Proceedings and Orders
20	Dec 3 2001		Motion of amici filers in No. 00-8727, McCarver v. North Carolina, to have their amici curiae briefs considered in support of petitioner in this case GRANTED.
25	Jan 10 2002		CIRCULATED.
31	Jan 10 2002	X	Brief amicus curiae of Criminal Justice Legal Foundation filed.
26	Jan 11 2002	X	Brief of respondent Virginia filed.
27	Jan 14 2002	X	Brief amicus curiae of States of Alabama, Mississippi, et al. filed.
29	Jan 22 2002	G	Motion of petitioner for appointment of counsel filed.
28	Jan 24 2002		Letter from counsel for McCarver amici received and distributed.
30	Jan 30 2002		Motion DISTRIBUTED. February 15, 2002 (Page 38)
32	Feb 12 2002	X	Reply brief of petitioner Daryl R. Atkins filed.
33	Feb 15 2002		Motion for appointment of counsel GRANTED and it is ordered that Robert E. Lee, Esquire, of Charlottesville, Virginia, is appointed to serve as counsel for the petitioner in this case.
34	Feb 20 2002		ARGUED.

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Supreme Court, U.S.
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No. 00-8452

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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00-8452
Atkins
v.
Virginia

Capital Case

QUESTIONS PRESENTED

1. In *Lilly v. Virginia*, this Court declared that for purposes of determining whether the Confrontation Clause precludes the admission of a hearsay statement, the admissibility of the self-inculpatory and non-self-inculpatory expressions in that statement should be assessed separately. Must courts determining whether the Due Process clause mandates the admission of a statement under *Green v. Georgia* and *Mills v. Maryland* similarly engage in a separate assessment of the admissibility of the self-inculpatory and non-self-inclupatory expressions in that statement?

2. Did the Supreme Court of Virginia err when, in the sentencing phase of a capital trial, it summarily invoked a state hearsay rule to preclude the defendant from presenting relevant, important, and independently reliable mitigating evidence that the defendant had no other means of presenting to the jury?

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

PETITION FOR A WRIT OF CERTIORARI

Daryl Renard Atkins respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia affirming the imposition of a sentence of death.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia upholding Atkins' conviction for capital murder but remanding for a new sentencing trial is published at *Atkins v. Commonwealth*, 510 S.E.2d 445 (Va. 1999) ("*Atkins I*"), and is reprinted in the accompanying Appendix ("App.") at 1-16. The opinion of the Supreme Court of Virginia on resentencing affirming imposition of a death sentence is published at *Atkins v. Commonwealth*, 534 S.E.2d 312 (Va. 2000) ("*Atkins II*"), and is reprinted at App. 17-34.

JURISDICTION

The Virginia Supreme Court issued its final judgment affirming the death sentence on September 15, 2000. Atkins filed a timely petition for rehearing, which the State court denied on November 3, 2000. App. 35. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the United States Constitution, which provide in relevant part as follows:

> [N]or [shall] cruel and unusual punishments [be] inflicted. U.S. CONST. amend. VIII.
>
> No State shall . . . deprive any person of life [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

The facts of the crime, as stated by the Virginia Supreme Court in the light most favorable to the Commonwealth, are as follows:

> On the afternoon of August 16, 1996, William A. Jones* and Atkins were "drinking and smoking weed" at the home Atkins shared with his father. During the course of that afternoon, "[a] couple of [Atkins'] friends came by, in and out." On several occasions during the afternoon and later that evening, those present pooled their money, and Atkins and Jones walked to a nearby convenience store to buy beer or were driven by one of Atkins' friends to an ABC store to buy liquor.
>
> That evening between 10:30 and 11:00 p.m., a friend of Atkins, known to Jones only as "Mark," arrived at the home. Mark had brought a handgun with him

* Prior to Atkins' trial, Jones entered into a plea agreement with the Commonwealth dated September 5, 1997, in which Jones agreed to testify against Atkins in exchange for a reduction in the charges against him arising out of the murder of Nesbitt.

> and gave it to Atkins after Atkins said "that he wanted to use it, he would bring it back in the morning." A short time later, Atkins and Jones again walked to the convenience store to buy beer. Atkins told Jones that he did not have enough money and was going to "panhandle and get some change up." Atkins had the handgun he had borrowed from Mark tucked behind the waistband of his pants, partially concealed by his belt buckle.
>
> While Jones waited, Atkins approached several people to ask for money and collected some from one or two. Nesbitt, who was a stranger to Atkins, arrived at the store in his truck at approximately 11:30 p.m. After a brief conversation with Atkins, Nesbitt went into the store. When Nesbitt returned to his truck and was preparing to leave the parking lot, Atkins "whistled" at him and Nesbitt stopped his truck.
>
> Atkins went to the passenger's side of the truck and Jones went to the driver's side. Atkins then pointed the handgun at Nesbitt and ordered Nesbitt to "[m]ove over, let my friend drive." Jones entered the truck from the driver's side and Atkins entered from the passenger's side.
>
> As Jones drove the truck away from the convenience store, Atkins demanded that Nesbitt surrender his wallet. Atkins removed $60 from the wallet and was returning it to Nesbitt when he noticed a bankcard inside the wallet. On Atkins' instruction, Jones drove to a branch of Crestar Bank where Atkins forced Nesbitt to withdraw $200 using the bankcard from the bank's drive-through automatic teller machine. The security camera in this automatic teller machine recorded the truck arriving at the bank shortly after midnight on August 17, 1996. The videotape produced by the camera showed that Jones was driving, Atkins was in the passenger seat, and Nesbitt was between them. Nesbitt had to lean across Jones in order to operate the machine. During this entire time, Atkins kept the handgun pointed at Nesbitt.
>
> Jones then drove to the parking lot of a nearby school where he and Atkins discussed what they should do with Nesbitt. Jones urged Atkins to "just tie him up so we can get away." Atkins told Jones he knew of a place near his grandfather's house in Yorktown where they could leave Nesbitt and directed Jones to drive toward Yorktown on Interstate 64. Nesbitt asked them "just don't hurt me" and made no attempt to escape.
>
> Upon arriving in a secluded area of York County off the Lee Hall exit of Interstate 64, Atkins exited the truck and ordered Nesbitt to do the same. "Nesbitt stepped out of the vehicle and probably took two steps" when Atkins began shooting him. Jones attempted to exit the truck because he feared that some of the shots were "coming in the truck." Unable to open the driver's side door, Jones rolled down the

driver's side window and "jumped" out of the truck.

Jones began to struggle with Atkins for the handgun and Atkins was shot in the leg during that struggle. After Jones obtained the handgun, he drove Atkins to the emergency room of a local hospital, leaving Nesbitt's dead body at the scene of the shooting. Outside the emergency room, Jones asked Atkins for some of the money that had been taken from Nesbitt and then drove away alone in Nesbitt's truck.

After leaving Atkins at the emergency room, Jones drove to a motel in Newport News where he abandoned Nesbitt's truck. Jones spent the next several days moving from motel to motel. He cut his hair in an attempt to disguise his appearance. Jones subsequently returned to the first motel, where police, who previously had discovered the abandoned truck at the motel and were maintaining a surveillance of the area, arrested him. The handgun was not found in the truck and was never recovered.

* * *

Investigator Frederick T. Lyons, a member of the major crimes section of the York County Sheriff's Office, . . . obtained still photographs and the videotapes from the automatic teller machines' security cameras and distributed copies to local police and media.

> After the media broadcast the photographs, several callers to a "crime line phone number" identified Jones as the driver of Nesbitt's truck. One caller told police that "a person that Mr. Jones runs with was a Daryl Atkins." Based upon these identifications, Lyons obtained an arrest warrant for Jones. After interviewing Jones' father and the father's girlfriend, Lyons "learned that Mr. Atkins was with William Jones," and obtained Atkins' address. Finding Atkins at home, Lyons was able to identify Atkins from the security camera photographs and placed him under arrest.

Atkins I, 510 S.E.2d at 449-51, App. 5-7 (brackets in original; footnote in original).

After Atkins was arrested and advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), he quickly cooperated with the police. He gave a 31-page statement to Lyons in which he acknowledged his participation in the abduction, the robbery, and the murder, although he denied being the actual triggerman.[1] App. 48, 51-52, *see generally* App. 36-82. At trial, Atkins tried to

[1]Except in a case of murder for hire, only the actual triggerman may be convicted of capital murder in Virginia. Other participants in the homicide may be convicted of first degree murder, for

cross-examine Lyons to bring out the substance of Atkins' statement to the police. App. 37-39. The prosecutor objected that any discussion by Lyons about Atkins' statement would be inadmissible as hearsay, App. 39-40, and the trial court agreed. App. 72-75. Atkins then took the stand and testified to the same information himself. App. 99-101. On direct review, the Virginia Supreme Court upheld the restriction on Lyons' testimony:

> On August 21, 1996, Atkins voluntarily gave a statement to Investigator Lyons in which Atkins admitted his participation in the abduction, robbery, and murder of Nesbitt. In that statement, however, Atkins denied that he had been the "triggerman" and asserted that Jones alone had shot Nesbitt. At trial, during cross-examination of Lyons, Atkins' counsel attempted to elicit testimony from Lyons that Atkins' statement contained this denial and assertion. The Commonwealth objected on the ground that, while the statement inculpated Atkins as a participant in these crimes, Atkins' denial that he was the "triggerman" was self-serving and inadmissible hearsay. The trial court ultimately sustained that objection and cautioned the jury to disregard any reference to this statement.
>
> Subsequently during his [own] testimony, Atkins was permitted to reference the content of this statement in great detail [because it came within the hearsay exception for a prior consistent statement].

Id. at 455, App. 12-13 (brackets added).

The jury found Atkins guilty of capital murder and fixed his sentence at death. The Virginia Supreme Court upheld the conviction, but it vacated the death sentence because of a serious defect in the penalty phase verdict forms, and it remanded for redetermination of the appropriate penalty. *Id.* 456-57, App. 14-16.

At the resentencing trial, the prosecutor presented testimony from live witnesses to bring the new jury up-to-speed about the circumstances of the offense and the fact of Atkins' guilt. The

which the maximum penalty is life without parole. *See Rogers v. Commonwealth*, 410 S.E.2d 621 (1991). At the time Atkins acknowledged participation in the homicide, he was charged with first degree felony murder — an offense that applies equally to the triggerman and nontriggerman. The homicide charge subsequently was raised to capital murder. App. 42.

prosecution also presented evidence relating to both of the aggravating factors provided by Virginia law: (i) that the crime was outrageously or wantonly vile, and (ii) that there was a probability Atkins would commit criminal acts of violence in the future. *See* Virginia Code § 19.2-264.2.

Atkins called Lyons as his own witness and attempted to elicit from him the mitigating fact that he (Atkins) had made an inculpatory statement very shortly after he was arrested in which agreed to cooperate with the police, promptly acknowledged participation in the offense, and demonstrated remorse. App. 107-110. On objection by the prosecution, the trial court summarily held that this testimony was inadmissible hearsay. The court based its decision on a perceived need to be consistent with its prior ruling at the guilt phase of the first trial. App. 110, 117. The Virginia Supreme Court affirmed the trial court's exclusion of this evidence on two related grounds. First, the State court held that testimony relating to Atkins' statement was inadmissible because it was hearsay.

> [D]uring direct examination, Atkins' counsel asked Lyons, "[A]fter you advised [Atkins] of [his *Miranda*] rights, did [Atkins] confess to you his involvement in the murder of Eric Nesbitt?" According to Atkins, the information that he sought to elicit by that question was the fact that he had admitted his participation in the murder of Nesbitt. Atkins argues that such information was relevant to the issues of Atkins' remorse and his cooperation with law enforcement authorities, both of which are proper subjects of mitigating evidence.
>
> The Commonwealth objected to the question, contending that it called for a hearsay statement. The Commonwealth also noted that, while Atkins confessed to Lyons his involvement in the abduction, robbery, and murder of Nesbitt, Atkins denied that he was guilty of capital murder. In the confession to Lyons, Atkins maintained that his accomplice alone was the "triggerman." Thus, according to the Commonwealth, for Lyons to appropriately answer the propounded question, he would have to tell the jury that Atkins denied that he pulled the trigger, which would have been contrary to the circuit court's prior ruling that evidence regarding Atkins' guilt would not be admitted at the resentencing hearing.
>
> The circuit court sustained the Commonwealth's objection on the basis that the testimony being elicited from Lyons was hearsay. We agree.

> In Atkins' initial appeal to this Court, we considered this same evidence and held that no exception to the hearsay rule applied which would allow Lyons to testify about the content of Atkins' statement to him. *Atkins*, 257 Va. at 176, 510 S.E.2d at 455. The proffer of this evidence at the resentencing hearing does not change the hearsay analysis. According to Code § 19.2-264.4(B), mitigating evidence relevant to sentencing is "subject to the rules of evidence governing admissibility." *See Cherrix v. Commonwealth*, 257 Va. 292, 309, 513 S.E.2d 642, 653, *cert. denied*, 528 U.S. 873, 120 S. Ct. 177, 145 L. Ed.2d 149 (1999) (subject to rules of evidence governing admissibility, trial court has discretion under Code § 19.2-264.4(B) to determine what evidence may be adduced in mitigation of offense); *Coppola v. Commonwealth*, 220 Va. 243, 253, 257 S.E.2d 797, 804 (1979), *cert. denied*, 444 U.S. 1103, 100 S. Ct. 1069, 62 L. Ed.2d 788 (1980) (same); *but see O'Dell v. Commonwealth*, 234 Va. 672, 701-02, 364 S.E.2d 491, 508, *cert. denied*, 488 U.S. 871, 109 S. Ct. 186, 102 L. Ed.2d 154 (1988) (holding that hearsay evidence contained in postsentence report is admissible based on language of Code §§ 19.2-264.5 and -299).

Atkins II, 534 S.E.2d at 315, App. 5-6 (footnote omitted).

As the second basis for its decision, the State court held that testimony relating to Atkins'–statement was inadmissible because Atkins' guilt was *res judicata* and could not be relitigated in the resentencing proceeding.

> In any event, we believe that the information that Atkins sought to elicit from Lyons improperly would have interjected at the new sentencing hearing a question about Atkins' guilt. In that statement to Lyons, Atkins denied that he was the "triggerman" and accused his accomplice of shooting Nesbitt. *Atkins*, 257 Va. at 175, 510 S.E.2d at 455. As we previously stated, a defendant is not allowed to argue or present evidence of "residual doubt" at a new sentencing hearing. *Stockton* [*v. Virginia*], 241 Va. 192, 211, 402 S.E.2d 196, 207, [*cert. denied*, 502 U.S. 902 (1991)].

Atkins II, 534 S.E.2d at 315, App. 6.

Atkins filed a timely petition for rehearing, which the Virginia Supreme Court summarily denied on November 3, 2000. App. 35.

REASONS FOR GRANTING THE WRIT

I. THE VIRGINIA SUPREME COURT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

1. In a long-running series of decisions, this Court has affirmed the general principle that in the sentence selection phase of a capital case, "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) (citing *Penry v. Lynaugh*, 492 U.S. 302, 317-18 (1989); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

On numerous other occasions, the Court has recognized the more specific principle that a state court's evidentiary rulings are not a constitutionally sufficient basis for denying, on a *per se* basis, a capital defendant's right to present mitigating evidence that relates to his character or record or to the circumstances of the offense. "Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett v. Ohio, supra; Hitchcock v. Dugger*, 481 U.S. 393 (1987); by the sentencing court; *Eddings v. Oklahoma, supra;* or by an evidentiary ruling, *Skipper v. South Carolina*, [476 U.S. 1 (1986)]." *Mills v. Maryland*, 486 U.S. 367, 375 (1988) (emphasis added).

As this Court explained in *Green v. Georgia*, 442 U.S. 95, 97 (1979) (*per curiam*), with respect to the defendant's mitigating testimony in a capital case, "Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment." *See also Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("[T]he [state's] hearsay rule may not be applied

mechanistically to defeat the ends of justice."); *Rock v. Arkansas*, 483 U.S. 44 (1987) (state's evidentiary rule cannot be applied in *per se* manner to prevent criminal defendant from testifying in his own defense); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (state evidentiary rule cannot be applied in manner that denies criminal defendant's right to present a defense); *Washington v. Texas*, 388 U.S. 14 (1967) (state rule prohibiting co-defendants from testifying for one another cannot be applied to prevent criminal defendant from introducing accomplice's testimony that accomplice had in fact committed the crime).

This Court should grant certiorari because the decision of the Virginia Supreme Court conflicts with the foregoing decisions. Atkins argued on direct appeal that under *Mills*, *Lockett*, *Eddings*, *Skipper*, and *Crane*, a state's evidentiary rule could interpose no barrier to the sentencer's consideration of mitigating evidence. App. 132-33. Yet the State court's analysis reflects no consideration of the principle that in the sentencing phase of a capital case, the Eighth and Fourteenth Amendments limit the broad discretion that state courts ordinarily exercise over the admission and exclusion of evidence. The State court undertook no analysis of whether the Due Process Clause mandated admission of mitigating evidence in the penalty phase of a capital case, notwithstanding the State evidentiary rule precluding the defendant from presenting hearsay testimony concerning his prior statements.[2]

Atkins certainly does not suggest, and this Court has not held, that the States must give up wholesale their sovereign prerogative to regulate the presentation of evidence in the sentencing phase

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[2]As the prosecutor correctly explained to the trial court, Virginia's common-law rules of evidence allow the State to present evidence relating to a defendant's prior statements without regard to the fact that it is hearsay. The defendant, however, may present evidence relating to his prior statements only if it comes within the hearsay exception for prior consistent statements. App. 45.

of a capital case. *See Romano v. Oklahoma*, 512 U.S. 1, 12 (1994) ("The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing."). Rather, as this Court narrowly has explained, a state's evidentiary rules cannot *per se* preclude the admission of mitigating evidence at a capital sentencing trial when that evidence could not be presented through non-hearsay testimony and when "substantial reasons exist[] to assume its reliability." *Green*, 422 U.S. at 97. The Virginia Supreme Court employed a *per se* policy.

On independent examination of the hearsay statement proffered in *Green*, this Court identified several facts that cloaked the mitigating evidence in that case with sufficient indicia of reliability to mandate admission. For example, the declarant had made the statement spontaneously to a close friend. The statement was against the declarant's penal interest. There was ample evidence to corroborate the statement. And the prosecution previously had considered the out-of-court statement sufficiently reliable that it had used it against the declarant in another proceeding to obtain a conviction and death sentence. *Id.*

In Atkins' case, the Virginia Supreme Court did not examine or advert to either the relevance or reliability of the mitigating hearsay statement. Indeed, that court does not appear ever to have examined whether relevant hearsay evidence was reliable when proffered by the defendant in the penalty phase of a capital trial.[3]

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[3]In *Cherrix* and *Coppola*, which it cited in *Atkins II*, the Virginia Supreme Court rejected the defendant's proffered non-hearsay testimony because it fell outside the definitional scope of mitigating evidence, not because the evidence was examined and found to be unreliable. In *O'Dell*, the State court made a blanket ruling that hearsay statements in a presentence report are admissible at a capital sentencing proceeding. The court did not base this ruling on any inquiry into the reliability of hearsay statements in presentence reports. Rather, it said that the common-law hearsay rule was trumped by statutes that specifically required submission of presentence reports and authorized the officers who prepared such reports "to thoroughly investigate and report upon the history of the accused and any other and all other relevant facts." *O'Dell*, 364 S.E.2d at 508.

If the State court had followed this Court's decisions and conducted a reliability inquiry, it would have found that the limited information Atkins sought to elicit from Lyons was reliable. That information — that when Atkins was advised of his *Miranda* rights, he promptly acknowledged participating in the abduction, the robbery, and the murder — was against Atkins' penal interest. The fact that Atkins had agreed to cooperate with law enforcement authorities and quickly acknowledged participating in these offenses was corroborated by the 31-page statement itself.[4] The truthfulness of the information Atkins sought to elicit was corroborated by the fact that before the first capital murder trial, Atkins pleaded guilty to the predicate charges of robbery and abduction. *Atkins I*, 510 S.E.2d at 447 n.1, App. 4. In the guilt phase of the capital murder trial, the Commonwealth argued, and the jury found, that Atkins participated in the murder. Moreover, the Commonwealth had the opportunity in the guilt phase of the first trial to test the reliability of the statement by cross-examining Atkins. Thus, there were substantial reasons to assume the reliability of the limited portion of the hearsay testimony that Atkins wanted to elicit in the penalty phase of the resentencing trial. Indeed, there was absolutely no basis on which anyone could conclude that Atkins did *not* participate in the abduction, the robbery, and the murder, and no basis on which anyone could conclude that Atkins did *not* quickly acknowledge participation and agree to cooperate when he was arrested.

2. Atkins circumvented the hearsay problem at the guilt phase of his original trial by testifying on his own behalf and relating the substance of the statement he had given to Lyons. That option was not available to Atkins at the resentencing proceeding before the new jury. The

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[4]Because of the trial court's rulings, Atkins' 31-page statement was never offered into evidence. It is not a part of the trial record.

resentencing trial court, viewing Atkins' guilt as *res judicata*, had imposed an across-the-board prohibition on any "inquir[y] into, comment upon or argu[ment about] any factual issue relative to [Atkins'] guilt. *Atkins II*, 534 S.E.2d at 315 n.3.

As demonstrated in more detail in Section II *infra*, both the trial court and the Virginia Supreme Court considered any reference to Atkins' statement to be an inquiry into or comment upon his guilt because the statement, taken as a whole, included Atkins' denial that he was the triggerman. Thus, although Atkins did not attempt to testify about his statement at the resentencing, there is no doubt that if he had tried to do so, the trial court would have ruled that his testimony was inadmissible, and the Virginia Supreme Court would have agreed.[5] Put more simply, regardless whether Atkins attempted to elicit information about his statement from Lyons or from the defendant, that testimony was still — in the State court's opinion — improper and beyond the scope of the resentencing trial because the statement as a whole included a denial that Atkins was the triggerman.

3. Recognizing the necessarily fact-specific nature of this Court's prior decisions in cases that pit state evidentiary rules against the imperative of the Due Process Clause, some courts have mirrored this Court's approach and conducted a case-by-case analysis in which they balance the interests of the parties. *See, e.g., Cunningham v. Peters*, 941 F.2d 535, 538 (7th Cir. 1991) ("Our task is to evaluate the exculpatory significance of relevant and competent evidence and then balance it against the competing state interest in the procedural rule that prevented the defendant from

[5]By negative implication, the Virginia Supreme Court confirmed that Atkins would not have been allowed to testify about his statement if he had taken the stand at the resentencing trial. In *Atkins I*, 510 S.E.2d at 455, App. 13, the court emphasized that "no prejudice resulted to Atkins" from the restriction on Lyons' testimony, because Atkins was able to present the same evidence through his own testimony. In *Atkins II*, by comparison, the court did not make the parallel suggestion that the restriction was harmless at the resentencing trial because Atkins could have presented the same mitigating testimony himself.

presenting this evidence at trial."), *cert. denied*, 503 U.S. 940 (1992)..

The Virginia Supreme Court did not perform a balancing test. This Court should grant certiorari to provide guidance and ensure uniformity among the state courts of last resort and the lower federal courts concerning the standards or methods to apply when a criminal defendant contends that exclusion of mitigating evidence would violate the Due Process Clause.

If the Virginia Supreme Court had employed a balancing test, it would have recognized that the State's interests in excluding the mitigating evidence were minimal in Atkins' case. The only concern of any weight on the State's side of the scale was its interest in the uniform application of its rules governing the presentation of evidence. The State may have had an interest in keeping the jury focused on the question of punishment rather than the question of guilt but, as Atkins has explained elsewhere in this petition, it was not necessary to re-open the question of guilt in order to admit the limited information that Atkins wanted to elicit. The State also had an interest in this case, as it has in all cases, in excluding evidence that is irrelevant or unreliable. As Atkins has explained elsewhere in this petition, there was nothing irrelevant or unreliable about the limited information Atkins wanted to elicit at the resentencing.

On Atkins' side of the balance was his interest in presenting truthful, noncumulative evidence about his character that might convince at least one juror to vote for a sentence of life imprisonment rather than death.[6] As this Court and the lower federal courts both have recognized, this is an interest of great weight. "'[T]he Supreme Court has been very sensitive to any impediment to the consideration of any type of mitigating evidence in a death sentencing hearing. . . . [S]ubject only to

[6]"In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life." Virginia Code § 19.2-264.4(E).

the loose evidentiary requirement of relevance, capital defendants have a right to offer any evidence they choose on character or record or circumstances of the offense.'" *Boyd v. French*, 147 F.3d 319, 326 (4th Cir. 1998) (quoting *Hutchins v. Garrison*, 724 F.2d 1425, 1437 (4th Cir. 1983), *cert. denied*, 464 U.S. 1065 (1984)), *cert. denied*, 525 U.S. 1150 (1999). Atkins also had an interest in rebutting the aggravating factor of future dangerousness by presenting truthful information about his character.

Under this Court's precedents, Atkins' interests were easily superior to the State's formalistic desire to have its rule of evidence applied in the same manner in both the guilt and penalty phases of a capital trial. The Court should grant certiorari because the Virginia Supreme Court's decision conflicts with this Court's decisions regarding the right to present mitigating evidence and the circumstances under which the Due Process Clause takes precedence over a state's rules of evidence in the penalty phase of a capital case.

II. THE VIRGINIA SUPREME COURT'S SECOND GROUND FOR DENYING ADMISSION OF THE EVIDENCE IS CONTRARY TO THE DECISIONS OF THIS COURT.

In addition to its ruling that the testimony Atkins wished to present was hearsay, the Virginia Supreme Court held that the testimony was inadmissible because Atkins' confession, taken as a whole, included the statement that Jones, rather than Atkins, was the triggerman. In the State court's view, the identity of the triggerman was *res judicata* and thus not a matter that the resentencing jury could be permitted to consider. "[W]e believe that the information that Atkins sought to elicit from Lyons improperly would have interjected at the new sentencing hearing a question about Atkins' guilt." *Atkins II*, 534 S.E.2d at 315, App. 6.

For purposes of this petition, Atkins assumes that state courts may properly exclude from a

resentencing hearing any evidence whose sole function is to raise a residual doubt about the defendant's guilt. *See Penry v. Lynaugh*, 492 U.S. 302, 320 (1989) (stating that in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), "a majority agreed that 'residual doubt' as to Franklin's guilt was not a constitutionally mandated mitigating factor."). [7] In other words, Atkins assumes that a state court properly may limit the resentencing trial to (i) evidence establishing or rebutting the aggravating factors and (ii) mitigating evidence concerning the defendant's character or record or the circumstances of the offense. This is true even though the jury at a unitary trial, having heard competing evidence concerning the defendant's guilt, might be moved by residual doubt to impose a life sentence rather than a death sentence. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1563 (1998) (reporting that in jury studies, residual doubt about defendant's guilt was most important reason given for choosing life sentence rather than death sentence); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 357 n.236 (noting that lingering doubt about defendant's guilt is sometimes strongest factor in jury's decision to impose life sentence); *cf. Lockhart v. McCree*, 476 U.S. 162, 181 (1986) (observing that criminal defendants can benefit in penalty phase of capital cases that are tried before unitary juries).

In the instant case, the State has never disputed that Atkins promptly gave a statement to Lyons in which he acknowledged that he had participated in the abduction, the robbery, and the murder of Eric Nesbitt. The State also has never disputed that this admission was relevant to Atkins'

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[7] Justice O'Connor has defined "residual doubt" as "a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.'" *Franklin*, 487 U.S. at 188 (O'Connor, J., concurring in judgment). Justice O'Connor explained that this lingering uncertainty does not come within the scope of proper mitigating evidence because it "is not a fact about the defendant or the circumstances of the crime." *Id.*

remorse, his acceptance of responsibility, and his willingness to cooperate with law enforcement authorities. The Virginia Supreme Court correctly recognized that these are proper subjects of mitigation evidence. *Atkins II*, 534 S.E.2d at 315, App. 5. As this Court recognized, "[i]n a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies." *Riggins v. Nevada*, 504 U.S. 127, 143-144 (1992) (Kennedy, J., concurring in judgment) (citing William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 51-53 (1987-88)).

The Virginia Supreme Court's exclusion of Lyons' testimony was based on its failure to parse Atkins' statement into its component parts and to consider separately the admissibility of each part. In this regard, the State court's error is analytically analogous to the error that this Court identified in *Lilly v. Virginia*, 527 U.S. 116 (1999). In *Lilly*, this Court pointed out that the declarant's out-of-court statement contained both self-inculpatory and non-self-inculpatory expressions. In the self-inculpatory portion the declarant, Mark Lilly, acknowledged his participation in the robbery and murder. In the non-self-inculpatory portion, Mark Lilly asserted that his brother, Benjamin Lilly, was the triggerman. As this Court carefully explained, the fact that the self-inculpatory portions of the statement were credible, and thus admissible, did not justify admission of the separate non-self-inculpatory (and non-credible) portions of the hearsay statement. *Id.* at 139 (opinion of Stevens, J.); *id.* at 144 (Rehnquist, C.J., concurring in judgment).

In Atkins' case, the declarant's out-of-court statement similarly included the self-inculpatory admission that Atkins participated in the abduction, the robbery, and the murder of Nesbitt. It also included the non-self-inculpatory declaration that Jones, rather than Atkins, was the triggerman.

Under this Court's precedents, the self-inculpatory part of the statement was mitigating and admissible. The non-self-inculpatory part of the statement, on the other hand, was irrelevant to any issue properly before the resentencing court, and for purposes of this petition, Atkins does not dispute its exclusion.

Significantly, Atkins wanted to elicit information at the resentencing only about the mitigating part of the statement. App. 107-110. Information about that part of Atkins' statement was important, relevant, independently reliable, and admissible under this Court's precedents. When counsel called Lyons as a defense witness and asked, "[A]fter you advised [Atkins] of [his *Miranda*] rights, did [Atkins] confess to you his involvement in the murder of Eric Nesbitt," *Atkins II*, 534 S.E.2d at 315, App. 5, Lyons properly could have testified that Atkins promptly acknowledged participating in the abduction, acknowledged participating in the robbery, and acknowledged participating in the murder. Period. Lyons, who was called in his capacity as a nonhostile witness for the defense, App. 106A-07, need not (and likely would not) have volunteered on direct examination the separate and nonresponsive information that Atkins denied being the actual triggerman.[8]

The Court should grant certiorari to confirm that the standards for assessing hearsay statements under the Due Process Clause are analogous to the standards for assessing hearsay statements under the Confrontation Clause when the statements at issue include both self-inculpatory and non-self-inculpatory expressions.

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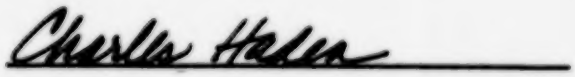
[8]On cross-examination of Lyons, of course, the prosecution could have chosen to explore the limits of Atkins' acceptance of responsibility as evidenced by his denial of being the triggerman — not to relitigate any issue relating to guilt but to try to diminish the weight of the mitigating evidence.

CONCLUSION

In two separate but related respects, the Virginia Supreme Court rendered a decision that is in conflict with this Court's precedents. For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,



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DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Virginia

COMMONWEALTH'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should certiorari be granted to review whether the Virginia Supreme Court correctly disallowed the hearsay testimony of a police officer about Atkins' pretrial statement in the penalty phase of Atkins' trial?

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STATEMENT OF THE CASE

On February 13, 1998, a jury in the Circuit Court of York County convicted the petitioner, Daryl Renard Atkins, of capital murder of Eric Nesbitt and use of a firearm in the commission of murder. The jury fixed Atkins' punishment at five years on the firearm conviction. The jury also sentenced Atkins to death on the capital murder conviction. On direct appeal, the Virginia Supreme Court affirmed Atkins' convictions but reversed his death sentence, concluding that an improper sentencing verdict form required a remand to the trial court for resentencing. Atkins v. Commonwealth, 257 Va. 160, 510 S.E.2d 445 (1999) (Atkins I).

A new sentencing hearing was held on August 17-19, 1999. At the conclusion of this hearing, the jury sentenced Atkins to death on the capital murder conviction, finding that he represented a continuing serious threat to society and that his offense was outrageously or wantonly vile, horrible or inhuman in that it involved aggravated battery to the victim. In a post-verdict sentencing hearing held October 26, 1999, the trial judge imposed sentence in accordance with the jury's verdict. On appeal after resentencing, the Virginia Supreme Court affirmed Atkins' death sentence. Atkins v. Commonwealth, 260 Va. 375, 534 S.E.2d 312 (2000) (Atkins II).

STATEMENT OF FACTS

Guilt Phase

The following facts are taken from the Virginia Supreme Court's opinion in Atkins I:

> On the afternoon of August 16, 1996, William A. Jones and Atkins were "drinking and smoking weed" at the home Atkins shared with his father. During the course of that afternoon, "[a] couple of [Atkins'] friends came by, in and out." On several occasions during the afternoon and later that evening, those present pooled their money, and Atkins and Jones walked to a nearby convenience

store to buy beer or were driven by one of Atkins' friends to an ABC store to buy liquor.

That evening between 10:30 and 11:00 p.m., a friend of Atkins, known to Jones only as "Mark," arrived at the home. Mark had brought a handgun with him and gave it to Atkins after Atkins said "that he wanted to use it, he would bring it back in the morning." A short time later, Atkins and Jones again walked to the convenience store to buy beer. Atkins told Jones that he did not have enough money and was going to "panhandle and get some change up." Atkins had the handgun he had borrowed from Mark tucked behind the waistband of his pants, partially concealed by his belt buckle.

While Jones waited, Atkins approached several people to ask for money and collected some from one or two. Nesbitt, who was a stranger to Atkins, arrived at the store in his truck at approximately 11:30 p.m. After a brief conversation with Atkins, Nesbitt went into the store. When Nesbitt returned to his truck and was preparing to leave the parking lot, Atkins "whistled" at him and Nesbitt stopped his truck.

Atkins went to the passenger's side of the truck and Jones went to the driver's side. Atkins then pointed the handgun at Nesbitt and ordered Nesbitt to "[m]ove over, let my friend drive." Jones entered the truck from the driver's side and Atkins entered from the passenger's side.

As Jones drove the truck away from the convenience store, Atkins demanded that Nesbitt surrender his wallet. Atkins removed $60 from the wallet and was returning it to Nesbitt when he noticed a bankcard inside the wallet. On Atkins' instruction, Jones drove to a branch of Crestar Bank where Atkins forced Nesbitt to withdraw $200 using the bankcard from the bank's drive-through automatic teller machine. The security camera in this automatic teller machine recorded the truck arriving at the bank shortly after midnight on August 17, 1996. The videotape produced by the camera showed that Jones was driving, Atkins was in the passenger seat, and Nesbitt was between them. Nesbitt had to lean across Jones in order to operate the machine. During this entire time, Atkins kept the handgun pointed at Nesbitt.

Jones then drove to the parking lot of a nearby school where he and Atkins discussed what they should do with Nesbitt. Jones urged Atkins to "just tie him up so we can get away." Atkins told Jones he knew of a place near his grandfather's house in Yorktown

where they could leave Nesbitt and directed Jones to drive toward Yorktown on Interstate 64. Nesbitt asked them "just don't hurt me" and made no attempt to escape.

Upon arriving in a secluded area of York County off the Lee Hall exit of Interstate 64, Atkins exited the truck and ordered Nesbitt to do the same. "Nesbitt stepped out of the vehicle and probably took two steps" when Atkins began shooting him. Jones attempted to exit the truck because he feared that some of the shots were "coming in the truck." Unable to open the driver's side door, Jones rolled down the driver's side window and "jumped" out of the truck.

Jones began to struggle with Atkins for the handgun and Atkins was shot in the leg during that struggle. After Jones obtained the handgun, he drove Atkins to the emergency room of a local hospital, leaving Nesbitt's dead body at the scene of the shooting. Outside the emergency room, Jones asked Atkins for some of the money that had been taken from Nesbitt and then drove away alone in Nesbitt's truck.

After leaving Atkins at the emergency room, Jones drove to a motel in Newport News where he abandoned Nesbitt's truck. Jones spent the next several days moving from motel to motel. He cut his hair in an attempt to disguise his appearance. Jones subsequently returned to the first motel, where police, who previously had discovered the abandoned truck at the motel and were maintaining a surveillance of the area, arrested him. The handgun was not found in the truck and was never recovered.

Garland S. Clay discovered Nesbitt's body at the crime scene sometime after 3:45 a.m. on August 17, 1996 and contacted police. Investigator Frederick T. Lyons, a member of the major crimes section of the York County Sheriff's Office, arrived at the crime scene at 5:15 a.m.

Lyons discovered six shell casings near Nesbitt's body. After determining that Nesbitt had an account at Crestar Bank, Lyons learned that two withdrawals from the account had been made at Crestar automatic teller machines the previous night, one for $60 and one for $200. Lyons obtained still photographs and the videotapes from the automatic teller machines' security cameras and distributed copies to local police and media.

After the media broadcast the photographs, several callers to a "crime line phone number" identified Jones as the driver of

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Nesbitt's truck. One caller told police that "a person that Mr. Jones runs with was a Daryl Atkins." Based upon these identifications, Lyons obtained an arrest warrant for Jones. After interviewing Jones' father and the father's girlfriend, Lyons "learned that Mr. Atkins was with William Jones," and obtained Atkins' address. Finding Atkins at home, Lyons was able to identify Atkins from the security camera photographs and placed him under arrest.

Dr. Leah L. E. Bush, an Assistant Chief Medical Examiner for the Commonwealth, performed an autopsy on Nesbitt's body. This autopsy revealed that Nesbitt had sustained eight separate gunshot wounds to the thorax, chest, abdomen, arms and legs. Several of the bullets exited and reentered the body. Three of the gunshot wounds were lethal. However, Nesbitt could have lived for several minutes before "the bleeding was to the point where his blood pressure would not support consciousness and life." Three bullets were recovered during the autopsy.

Additional forensic evidence showed that the six shell casings recovered from the crime scene had all been fired from the same weapon, as were the three bullets recovered from Nesbitt's body, a bullet recovered from Nesbitt's truck, and a bullet recovered from Atkins' leg. Bloodstains found on the passenger seat and interior passenger side door of Nesbitt's truck were identified as consistent with either Nesbitt's or Atkins' blood types. None of the tested samples was identified as likely to have come from another source.

Subsequent to his arrest and prior to his trial, while an inmate in the York County jail, Atkins shared a cell with Stephen R. Burton. According to Burton, Atkins told him "[t]hat he had put a boy out of a truck in York County, that he had shot at a boy to scare him." Atkins told Burton that he was not worried about being convicted because the police "wouldn't find the weapon . . . they didn't have the weapon, the only thing they had on him was a picture holding a gun to a boy" at the automatic teller machine. Atkins also told Burton that he had shot himself in the leg, but that he could not remember it because he was "too messed up" on drugs and alcohol to realize it.

Atkins testified on his own behalf and was the only defense witness on the issue of guilt. Atkins' account of the robbery and murder was in direct conflict with that of Jones. According to Atkins, he and Jones had gone to the convenience store with the intent to rob someone, and it was Jones who was armed and who initiated the contact with Nesbitt. Atkins maintained that Jones forced his way into Nesbitt's truck, and then gave the handgun to

> Atkins so that Jones could drive. Atkins admitted taking money from Nesbitt's wallet and forcing Nesbitt to withdraw money from the automatic teller machine.
>
> Atkins further maintained that Jones said "he know *[(sic)]* a place and he never told me" where they could take Nesbitt and "tie him up." After leaving the interstate, according to Atkins, Jones stopped the truck, took the handgun back from Atkins, placed it in a holster on his belt, and directed Atkins and Nesbitt to change places so that Nesbitt was sitting by the passenger door. Jones then drove "a little more" and then exited the truck and ordered Nesbitt to get out of the truck as well. With regard to the critical issue of who was the "triggerman" in the murder of Nesbitt, Atkins maintained that Jones shot Nesbitt several times and that one of the shots struck Atkins in the leg.
>
> The jury was instructed and heard closing arguments from counsel. After its deliberations, the jury returned verdicts convicting Atkins of capital murder and the associated firearm crime.

Atkins I, 257 Va. at 165-169, 510 S.E.2d 449, 451 (1999) (footnote omitted).

Penalty Phase

At resentencing, on the issue of vileness, the Commonwealth presented the testimony of Dr. Leah Bush. She testified that Nesbitt sustained eight separate gunshot wounds to the thorax, chest, abdominal area and to the arms and legs. Many of the bullets, however, had exited and then reentered Nesbitt's body, resulting in eighteen distinct bullet wounds. Three of the gunshots perforated Nesbitt's lungs, heart and aorta, caused massive internal hemorrhaging, and were "lethal." Bush testified that Nesbitt's injuries were painful and not immediately lethal. In fact, Nesbitt could have lived several minutes before dying.

To prove future dangerousness the Commonwealth introduced sentencing orders which reflected that Atkins previously had been convicted of five counts of robbery, maiming, grand larceny, breaking and entering, abduction and eight counts of use of a firearm in the commission of a felony. Dennis Tuninei, Shane Stoops and John Hultquist testified that they were robbed at

gunpoint by Atkins in April of 1996 as they were using a pay phone. In addition, Tuninei testified that during the robbery Atkins had hit him over the head with a broken bottle.

Kevin Phillips then testified that he worked as a pizza delivery man in June of 1996. As he was delivering a pizza to a house on Sacramento Street in Hampton, he was approached by three men who put a gun to his head, forced him to crawl to his car and drove him to a swamp. On the drive to the swamp, his captors debated whether to kill him. Once at the swamp he was told to "lay on the ground...and the gun was put in [his] back." Phillips was then told to get up and that he "had five seconds to run" before he was killed. Phillips started crawling through the swamp and his captors drove away. Atkins was charged and convicted of abduction, use of a firearm and robbery arising out of this incident.

Finally, Amanda Hamlin testified that she was the victim with respect to Atkins' 1996 maiming conviction. Hamlin testified that, as she was outside one evening mowing her yard, Atkins "slapped a gun up against [her] head." Atkins dragged her off her lawnmower, hit her again with the gun and then "put the gun and to [her] stomach and shot [her]." As a result of this unprovoked assault, Hamlin was hospitalized for twenty-one days.

As purported mitigation, Atkins introduced the testimony of a psychologist that Atkins was mildly mentally retarded and that in a structured prison setting away from alcohol and drugs, Atkins' risk for future violent behavior could decrease. In rebuttal, however, the Commonwealth's appointed psychologist testified that Atkins was of average intelligence and was not mentally retarded.

REASONS FOR DENYING THE WRIT

ATKINS' CLAIM THAT HE WAS DENIED HIS RIGHT TO PRESENT MITIGATING EVIDENCE IN VIOLATION OF THE EIGHTH AMENDMENT IS, IN REALITY, A SIMPLE STATE LAW ISSUE AND IS WITHOUT MERIT IN ANY EVENT.

Prior to trial, Atkins gave a statement to Detective Troy Lyons in which he admitted abducting the victim by gunpoint and forcing him, also at gunpoint, to withdraw $200 from an automated teller machine of a local bank. In this statement, Atkins, however, adamantly denied murdering the victim and squarely placed the blame for the murder on his co-defendant. At trial, the court disallowed testimony from Lyons about this statement. On direct appeal, the Virginia Supreme Court affirmed the trial court's decision to exclude Lyons' testimony holding that it was clear hearsay and that "no exception to the hearsay rule applied which would allow Lyons to testify about the content of Atkins' statement." Atkins II, 260 Va. at 381, 534 S.E.2d at 315.

Atkins asserts that this Court should grant certiorari because the decision of the Virginia Supreme Court disallowing this hearsay testimony during the penalty phase of his capital murder trial violated the Eighth and Fourteenth Amendments. Atkins asserts that Lyons' testimony about his statement was "mitigating" because it tended to show that he had accepted responsibility for his role in the crime. Certiorari, however, should not be granted for at least two reasons: no matter how Atkins dresses up his claim, it presents only a mere state law evidentiary question and the claim is without merit.

A. State law issue

Despite Atkins' efforts to dress his evidentiary claim in a cloak of constitutional

dimension, at bottom the claim is purely one of state law.[1] This Court has, on numerous occasions held that evidentiary matters and rulings are purely matters of state law. See Romano v. Oklahoma, 512 U.S. 1, 11 (1994) (the Eighth Amendment does not establish a "federal code of evidence" binding on the states in a capital sentencing proceeding). See also Spencer v. Texas, 385 U.S. 554, 563-564 (1967) ("Due Process Clause guarantees the fundamental elements of fairness in a criminal trial"...[federal courts] are not a "rule-making organ for the promulgation of state rules of criminal procedure."); Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (the Constitution leaves to judges..."wide latitude" to exclude evidence that is "repetitive..., only marginally relevant" or poses an undue risk of "harassment, prejudice, [or] confusion of the issues") and Chambers v. Mississippi, 410 U.S. 284, 306 (1973) (states accorded respect "in the establishment and implementation of their own criminal trial rules and procedures").

This straightforward state law evidentiary question presents no compelling reason to grant certiorari. See Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945); Michigan v. Long, 463 U.S. 1032, 1041 (1983).

[1] Generally, in Virginia, a defendant may introduce his own prior consistent statement only when the prosecution suggests that the defendant has a motive to falsify, alleges that the defendant's testimony is a recent falsification, or attempts to impeach the defendant with a prior inconsistent statement. See Maretta v. Commonwealth, 231 Va. 128, 128 n.3, 340 S.E.2d 828, 831 n.3 (1986). None of these situations had occurred at the time Lyons testified. See also Charles E. Friend, The Law of Evidence in Virginia, § 18-4, 102 (4th ed. 1993) (When offered by the defendant, his out-of-court declarations are not subject to cross-examination by the prosecution. Therefore, such statements are appropriately inadmissible unless offered, not to prove the truth of their content, but to prove only that the defendant spoke consistently with his present testimony, the credibility of which is being challenged.) None of these situations existed when Atkins attempted to introduce his statement through the testimony of Officer Lyons.

B. No Merit

As Atkins recognizes, this Court never has held that states give up wholesale their sovereign prerogative to regulate the presentation of evidence in the sentencing phase of a capital trial. (Atkins' Pet. at 9-10). Rather, this Court has recognized that, to satisfy the Eighth Amendment, a state's evidentiary rules cannot per se preclude the admission of mitigating evidence at a capital trial when the evidence could not be presented through non-hearsay testimony and when "substantial reasons exist to assume its reliability." Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam).

Consistent with Green, there was no such per se bar in Atkins' case. Atkins could have taken the stand himself and told the jury that he had abducted and robbed Nesbitt and that he told this to police when he was questioned prior to trial.

Atkins asserts that this Court should ignore the undeniable fact that he could have introduced his purported mitigation evidence if he simply had testified in his own behalf. Atkins speculates, and asks this Court to adopt his speculation as a fact, that the trial court would not have permitted him to testify because it had imposed an "across-the-board prohibition" on any inquiry into, comment upon or argument about a factual issue relative to his guilt. (Atkins' Pet. at 12). This simply is not the case. The trial court did rule, consistent with this Court's decision in Franklin v. Lynaugh, 487 U.S. 164 (1988) that it would not permit evidence which was introduced solely to establish "residual doubt" about Atkins' guilt. The trial court, however, never ruled that Atkins was prohibited from testifying in his own behalf and never ruled that, if

Atkins elected to testify, his testimony would be sanitized in any way.[2] The simple fact of the matter is that ***Atkins elected not to testify at sentencing. He never was refused permission to do so on any basis whatsoever.***[3]

In short, the Virginia trial court and Virginia Supreme Court imposed no per se rule excluding Atkins' purported mitigation evidence. Thus, Atkins' federal constitutional claim is without merit.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
Respondent herein.

By: _____
Counsel

[2] In fact, the Commonwealth conceded at oral argument in the Virginia Supreme Court that if Atkins had taken the stand at trial the evidence which clearly was inadmissible through Lyons' testimony—Atkins' pretrial statement and the admissions therein—would then have been admissible.

[3] It is highly unlikely that any trial judge in the nation, when faced with a defendant who freely elected to exercise his Fifth Amendment right to testify in his own behalf, would impose an "across the board" prohibition on such testimony.

[4] Atkins' claim that the Virginia Supreme Court failed to "parse" his statement into component parts and consider separately the admissibility of each part is defaulted. (Atkins' Pet. at 16). Atkins never argued on direct appeal that portions of his statement were admissible through Lyons' testimony while other parts were not. It was an "all-or-nothing" proposition for Atkins. That is, Atkins argued only that the entire statement should have been admitted during Lyons' testimony. (See Atkins resentencing brief, attached hereto).

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No. 00-8452

IN THE
SUPREME COURT OF THE UNITED STATES

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Virginia

RESPONDENT'S CERTIFICATE OF SERVICE

I am counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States. On March 8, 2001, the Respondent's Brief in Opposition was sent by U.S. Mail to the Clerk of this Court and a copy of the same was mailed to Robert E. Lee, Jr., Esquire, Virginia Capital Representation Resource Center, Third Floor, 2421 Ivy Road, Charlottesville, Virginia 22903, counsel for petitioner.

Pamela Rumpz

Pamela A. Rumpz
Assistant Attorney General

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No. 00-8452

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Virginia

REPLY BRIEF FOR PETITIONER

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The Commonwealth does not dispute that this case presents a significant and recurring issue of importance to the administration of justice. Its reasons why certiorari nonetheless should be denied are disingenuous or without merit.

1. Atkins is not raising a state law issue. For purposes of this petition, Atkins assumes the Virginia Supreme Court correctly applied its own rules of evidence.

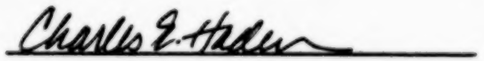
2. Atkins' federal constitutional claim is not defaulted for failure to make the identical argument below. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they make below." *Yee* v. *Escondido*, 503 U.S. 519, 534 (1992); accord *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

3. Without inviting a citation for contempt, Atkins could not have taken the stand and even *attempted* to testify about the mitigating aspects of his statement to Investigator Lyons. The Commonwealth sought and obtained a ruling *in limine* specifically "order[ing] *Atkins and his counsel* 'to refrain from *any attempt*, during the re-sentencing proceeding, to inquire into, comment upon or argue any factual issue relative to [Atkins'] guilt.'" *Atkins v. Commonwealth*, 534 S.E.2d 312, 315 n.3 (Va. 2000) (emphases added), App. 20-21 n.3. Atkins tested the limits of this ruling by calling Investigator Lyons; he got his hand slapped for doing so. Having secured and enforced the broad benefit of the *in limine* ruling, it is disingenuous for the Commonwealth to argue that Atkins would have been exempt from that ruling if only he had tried to give testimony that, in the court's view, was a "comment upon . . . [a] factual issue relative to [Atkins'] guilt."

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,



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DARYL RENARD ATKINS,
Petitioner-Appellant,

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COMMONWEALTH OF VIRGINIA
Respondent-Appellee.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court. I further certify that on March 14, 2001, I caused the foregoing Petition for a Writ of Certiorari and accompanying Appendix to be served by first-class mail, postage prepaid, on Pamela A. Rumpz, Esq., Assistant Attorney General, 900 East Main Street, Richmond, VA 23219.

Rob Lee

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March 14, 2001

Hon William K. Suter, Clerk
Supreme Court of the United States
One First Street NE
Washington, DC 20543

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SUPREME COURT, U.S.

RE: Atkins v. Virginia, No. 00-8452

Dear Mr. Suter:

Enclosed for filing in the above-referenced matter, please find the original plus ten copies of Mr. Atkins' reply brief.

Yours truly,

Rob Lee

Robert E. Lee
Counsel for Petitioner

cc: Charles Haden, Esq.
Pamela A. Rumpz, Esq.

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8 pp

SUPPLEMENT TO QUESTIONS PRESENTED

Whether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment?

Daryl Renard Atkins respectfully submits the following as supplement to his petition for a writ of certiorari pending with the Court.

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S EXECUTION WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE PETITIONER IS RETARDED AND THERE IS NOW A NATIONAL CONSENSUS AGAINST EXECUTING THE MENTALLY RETARDED

On March 26, 2001, the Court granted certiorari review in *McCarver v. North Carolina*, ___ S. Ct. ___, No. 00-8727 (March 26, 2001), on the question of whether the execution of persons who are mentally retarded violates the Eighth Amendment ban on cruel and unusual punishment. McCarver had a Verbal and Performance Scale IQ of 70 and a full scale IQ of 67. *McCarver*, Petition for Writ of Certiorari, at 7.

Pretrial intelligence testing of Daryl Atkins showed that he had a full scale IQ of 59. *Atkins v. Commonwealth*, 534 S.E.2d 312, 312 (Va. 2000) ("*Atkins II*") (Hassell and Koontz, JJ., dissenting). "Less than one percent of the American population at large has a score of 59 or below." *Id.* at 323 (Hassell, J., dissenting). The mental health expert who interviewed and tested Atkins stated that Atkins was not "'faking' when he took the test," and concluded that he was mentally retarded based on his IQ score and his limited capacity for adaptive behavior. *Id.* at 322. The State's mental health expert testified that the testing and resultant IQ scores were correct. *Id.* at 323.[1]

---

[1]As is the case in *McCarver*, the State offered evidence disputing the defendant's mental retardation.

The dissenting state court justices pointed out that Virginia "has never approved the imposition of the death penalty upon a defendant who is mentally retarded *and* had an IQ as low as 59." *Id.* at 322 (emphasis in original). In *Burns v. Commonwealth*, 541 S.E.2d. 872 (Va. March 2, 2001), decided after *Atkins II*, the Virginia Supreme Court rejected Burns' claim that a death sentence was not appropriate because of his borderline intellectual functioning (Burns had a full scale IQ of 77), because "we have approved the imposition of the death penalty for a defendant with a significantly lower IQ than that of Burns. *See Atkins v. Commonwealth*, 260 Va. 375, 387-89, 534 S.E.2d 312, 319-21 (2000) (defendant had IQ of 59)." *Burns*, 541 S.E.2d at ___ (page reference not yet available).

In *McCarver*, the Court granted certiorari to consider whether a national consensus against the execution of the mentally retarded has emerged and whether the execution of persons afflicted with mental retardation constitutes cruel and unusual punishment under the federal constitution. In *Penry v. Lynaugh*, 492 U.S. 302 (1989), a sharply divided Court ruled that the execution of the mentally retarded did not violate the Eighth and Fourteenth Amendments to the United States Constitution. In her opinion for the Court, Justice O'Connor wrote, "While a national consensus against the execution of the mentally retarded may someday emerge reflecting the 'evolving standard of decency that marks the progress of a maturing society,' there is insufficient evidence of such a consensus today." *Id* at 340. Since that decision, however, there has been a substantial change in American society, and Atkins contends that the execution of the mentally retarded now constitutes cruel and unusual punishment.

At the time of the decision in *Penry*, only the federal government and one state, Georgia, prohibited the execution of the mentally retarded.[2] This Court noted that in one additional state, Maryland, a law would soon take effect protecting the mentally retarded from execution.[3]

Since the decision in *Penry*, eleven more states — Arkansas, Colorado, Indiana, Kansas, Kentucky, Nebraska, New Mexico, New York, South Dakota, Tennessee, and Washington — have recognized the unusual cruelty and inhumanity of executing mentally retarded individuals and have outlawed the death penalty for mentally retarded persons.[4] When combined with the twelve states and the District of Columbia that have prohibited the death penalty altogether, that means the majority of jurisdictions in this country prohibit the execution of the mentally retarded. Given this "objective evidence of how our society views [this] particular punishment today," *Penry*, 492 U.S. at 331, this Court should find that execution of Petitioner would violate the federal constitution.

The Eighth Amendment does not have a static meaning in American jurisprudence. "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Therefore, in determining whether a punishment violates the cruel and unusual punishment clause of the United States Constitution, the question is not whether such punishment has always violated the constitution. The question is whether the punishment offends contemporary standards.

---

[2] *See* 18 U.S.C. § 3597(c); Ga. Code Ann. § 17-7-131(j).
[3] *See* Md. Code Ann. Art. 27 § 412.
[4] *See* Ark. Code Ann. § 5-4-618 (1993); Colo. Rev. Stat § 16-9-401-403; Ind. Code § 35-36-9-1; Kan. Stat. Ann. § 21-4623; Ky. Rev. Stat. § 532.130-140; R.R.S. Neb. § 28-105.01; N.M. Stat. Ann. § 31-20A-2.1 (1978); N.Y. Crim. Proc. § 400.27; S.D. Codified Laws § 23A-27A-26.1; Tenn. Code Ann. Tit. § 39, ch. 13, pt. 2 § 39-13-203; Wash. Rev. Code Ann. § 10.95.030.

When this Court has determined that an aspect of a state sentencing scheme violates the national consensus, it has ruled that executions pursuant to that scheme violate the Eighth and Fourteenth Amendments. *See Woodson v. North Carolina*, 428 U.S. 280 (1976) (finding mandatory death penalty schemes to be unconstitutional); *Coker v. Georgia*, 433 U.S. 584 (1977) (finding death penalty for rape of adult woman excessive under the Eighth Amendment); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (finding death sentence for persons fifteen and younger a violation of Eighth Amendment); *Ford v. Wainwright*, 477 U.S. 399 (1986) (finding that execution of insane violations Eighth Amendment); *Enmund v. Florida*, 458 U.S. 782 (1982) (finding death penalty for robber whose co-conspirator kills someone during the robbery, without more, excessive under the Eighth Amendment).

McCarver has persuaded the Court that it is time for this Court to assess whether American society has changed significantly over the past decade to the point that the execution of the mentally retarded now violates American standards of decency. Recognition of such progress is consistent with this Court's Eighth Amendment jurisprudence. In 1976, the Court recognized a national consensus against previously constitutionally permissible mandatory death sentences and ruled that such punishments violate the Eighth Amendment. *Woodson, supra*. Execution for non-homicide crimes once were common and constitutional but, in 1977, the Court recognized a national consensus against executing people for crimes like rape. *See e.g., Coker, supra*. The Court serves this line of jurisprudence well by addressing whether there is now a national consensus against executing persons afflicted with mental retardation.

Petitioner asks this Court to grant *certiorari* in this case on the Supplement to the Question Presented or, in the alternative, to hold its decision in this case pending final resolution of the matter to be decided by the Court in *McCarver*.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari or other appropriate relief.

Respectfully submitted,

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No.

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On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court. I further certify that on March 29, 2001, I caused the foregoing Petition for a Writ of Certiorari and accompanying Appendix to be served by first-class mail, postage prepaid, on Pamela A. Rumpz, Esq., Assistant Attorney General, 900 East Main Street, Richmond, VA 23219.

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No. 00-8452

IN THE

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Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the
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SUPPLEMENT TO COMMONWEALTH'S BRIEF IN OPPOSITION

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Counsel for Respondent

QUESTION PRESENTED

Should certiorari be granted to review an issue that was neither timely filed in this Court nor raised below?

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STATEMENT OF THE CASE

On February 1, 2001, Atkins filed his petition for writ of certiorari raising only the following issues:

I. The Virginia Supreme Court decided an important question of federal law in a way that conflicts with relevant decisions of this court; and

II. The Virginia Supreme Court's second ground for denying admission of the evidence is contrary to the decisions of this court.

On or about March 8, 2001, the Commonwealth filed its brief in opposition. Now, four weeks later, Atkins has filed a "supplement" to his petition for writ of certiorari raising an entirely new issue.

SUPPLEMENTAL REASONS FOR DENYING THE WRIT

I. ATKINS' SUPPLEMENTAL CLAIM IS JURISDICTIONALLY BARRED.

Atkins contends that his execution would violate the Eighth Amendment because he allegedly is mentally retarded and there is now a recognized national consensus against executing the mentally retarded. Atkins, however, never raised this Eighth Amendment claim in the Virginia Supreme Court. Indeed, it was only in conjunction with his assertion that his sentence was disproportionate under Virginia Code § 17-110.1C(1) that Atkins even mentioned

his alleged mental retardation.*

In the Virginia Supreme Court, Atkins conceded that the Eighth Amendment does not prohibit execution of the mentally retarded. (Virginia Supreme Court Br. at 11). Atkins thus argued solely as a matter of state law as follows:

> Mr. Atkins has been unable to find a case ***in Virginia*** in which an individual with an IQ of 59 has been sentenced to death. While this Court has upheld death sentences for individuals with low IQs (See Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202 (1979) (low normal intelligence); Washington v. Commonwealth, 228 Va. 535, 323 S.E.2d 577 (1984) (69 IQ); Correll v. Commonwealth, 232 Va. 454, 352 S.E.2d 352 (1987) (68 IQ); and Yeatts v. Commonwealth, 242 Va. 121, 410 S.E.2d 254 (1991) (70 IQ), today society's standards have evolved to the point that imposition of the death penalty on an individual with a 59 IQ who is not eligible for parole ***is excessive***.

(Virginia Supreme Court Br. at 11, emphasis added). Atkins' argument below expressly did not rely on the Constitution.

The Virginia Supreme Court, moreover, specifically and solely considered only what it was asked to consider: whether Atkins' alleged mental retardation rendered his sentence disproportionate under § 17.1-313(C):

> Thus, considering "both the crime and the defendant," Code § 17.1-313(C), and the record before us, we cannot say that Atkins' sentence of death is excessive or disproportionate to sentences generally imposed in this Commonwealth for capital murders comparable to Atkins' murder of Nesbitt. We are not willing to commute Atkins' sentence of death to life imprisonment merely because of his IQ score. Dr. Nelson and Dr. Samenow agreed that an IQ score is not the sole definitive measure of mental retardation. Both experts also testified that Atkins was able to appreciate the criminality of his conduct and understood that it was wrong to shoot Nesbitt.
>
> Accordingly, we perceive no reason to commute Atkins' sentence of death and will affirm the judgment of the circuit court.

Atkins v. Commonwealth, 260 Va. 375, 390, 534 S.E.2d 312, 321 (2000).

Simply put, the Virginia Supreme Court never decided the Eighth Amendment issue because it never was asked to do so. Because the claim was not raised in the court below, this Court has no jurisdiction to consider it. See Michigan v. Long, 463 U.S. 1032, 1039 (1983); Yee v. Escondido, 503 U.S. 519, 533 (1992); Illinois v. Gates, 462 U.S. 213, 218-220 (1983); Rule 14.1(g)(1).

II. ATKINS' SUPPLEMENTAL CLAIM RAISES A FACTUAL QUESTION AND, THUS, IS NOT APPROPRIATE FOR CERTIORARI.

In conducting the proportionality review mandated by Virginia Code § 17.1-313(C), the Virginia Supreme Court described the conflicting evidence of Atkins' alleged mental retardation:

> Atkins' full scale IQ score was based on a test known as the Wechsler Adult Intelligence Scale-III (WAIS-III), which was administered to him by a forensic clinical psychologist, Dr. Evan Stuart Nelson. According to Dr. Nelson, Atkins' full scale IQ of 59 means that Atkins is mildly mentally retarded. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) 40 (1994). However, Dr. Nelson also acknowledged that Atkins might have scored two or three points higher if he had not been mildly depressed when Dr. Nelson administered the test.
>
> Dr. Nelson further explained that a diagnosis of mental retardation is not simply a question of an IQ score. Mental retardation also involves the inability to function independently as compared to the norm for persons of the same age. Consequently, a diagnosis of

---

* Atkins phrased the issue thusly: "Is the sentence of death excessive (Assignments of Error 1 and 2)." Atkins' assignments of error 1 and 2 read:

> 1]. The sentence of death was imposed under the influence of passion, prejudice or other arbitrary factor.
>
> 2]. The sentence of death is excessive or disproportionate to the penalty imposed in similar cases.

(Copy of Atkins' direct appeal brief attached).

mental retardation is based on an individual's IQ scores along with that person's ability to function in the world. Finally, despite his opinion that Atkins is mildly mentally retarded, Dr. Nelson admitted that Atkins' capacity to appreciate the criminal nature of his conduct was impaired, but not destroyed; that Atkins understood that it was wrong to shoot Nesbitt; and that Atkins meets the general criteria for the diagnosis of an antisocial personality disorder.

In addition to Dr. Nelson's testimony, the jury heard testimony from Dr. Stanton E. Samenow, a forensic clinical psychologist called as a witness by the Commonwealth. Based on two interviews with Atkins, ***Dr. Samenow "sharply disagree[d]" with Dr. Nelson's conclusion that Atkins is mildly mentally retarded. Instead, Dr. Samenow testified that Atkins is of at least average intelligence.*** Dr. Samenow based his conclusion on Atkins' vocabulary, knowledge of current events, and other factors from the Wechsler Memory Scale, Wechsler Adult Intelligence Scale and Thematic Apperception Test. For example, Atkins knew that John F. Kennedy was the president in 1961. He also correctly identified the last two presidents, as well as Virginia's current governor. Dr. Samenow further explained that Atkins used "sophisticated words" such as "orchestra," "decimal," and "parable;" that Atkins could recall information Dr. Samenow asked him to remember; and that Atkins could put together a story involving cause and effect.

Dr. Samenow also reviewed Atkins' academic records and noted that, while Atkins had passed the Literacy Passport Test, his academic performance had been terrible and that his school records were "punctuated with statements" by teachers about Atkins' lack of motivation and concentration, his poor study habits, and his ability to do better in school. Finally, Dr. Samenow, like Dr. Nelson, opined that Atkins was able to appreciate the criminality of his conduct and to conform his behavior to the requirements of the law, and that Atkins satisfies most of the criteria for the diagnosis of an antisocial personality disorder.

* * *

Because Atkins asserts that he cannot be sentenced to death due to alleged mental retardation, we must consider, as part of our proportionality review, the same evidence heard by the jury regarding Atkins' mental capacity. In examining that evidence, we find it significant that both Dr. Nelson and Dr. Samenow agreed that a diagnosis of mental retardation involves more than merely

determining a person's IQ score; it also requires consideration of an individual's adaptive functioning.

With regard to the issue of adaptive functioning, Dr. Nelson testified that, in determining an individual's ability to function independently, it was necessary to talk with family members, and to review school and employment records. He further stated that he had followed through on that inquiry by reviewing Atkins' academic records and talking to Atkins' parents. As a result of the inquiry, Dr. Nelson reported that Atkins had received poor grades, failed many tests and classes, and was placed in remedial academic courses on a number of occasions. He also stated that Atkins' parents described a number of deficits, but Dr. Nelson never elaborated on the nature of those deficits. In other words, Dr. Nelson never identified an area of significant limitation in Atkins' adaptive functioning other than what he termed Atkins' "academic failure."

In contrast, Dr. Samenow provided the following explanation when asked whether Atkins has any impairment in his adaptive functioning:

> Well, Mr. Atkins never lived independently. In other words, he was not a self-supporting member of society. However, he told me he was able to wash his clothes, wash and dry his clothes, he used his parents' washing machine and dryer. He told me – when I asked him if he was able to cook, he gave me his recipe for cooking chicken.
>
> This Defendant...as I understand it, lived a life in which he didn't work, and I don't mean just didn't hold a job, that he didn't do, but then again there are a lot of 18-year-olds who maybe haven't worked because they've been in school. But he didn't work in school, either.
>
> So the point is he chose a certain – to live a certain way of life, and there was no lack of ability to adapt and to take care of basic needs.

Atkins, 260 Va. at 386-390, 534 S.E.2d at 319-321 (footnotes omitted) (emphasis added). Given the conflicting evidence on the issue of whether Atkins even is mentally retarded, Atkins' case does not present the question that he would have this Court decide: whether the Eighth Amendment prohibits execution of a mentally retarded capital murderer. In any event, the

Virginia Supreme Court's fact-specific determination that Atkins' alleged mental retardation did not render his sentence disproportionate under state law does not warrant a grant of certiorari. See Texas v. Mead, 465 U.S. 1041 (1994) (Stevens, J.) (court does not review cases which primarily present questions of fact). See also Pulley v. Harris, 465 U.S. 371 (1984) (proportionality review raises no federal issue).

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
Respondent herein.

By: _____
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Supreme Court of Virginia

RESPONDENT'S CERTIFICATE OF SERVICE

I am counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States. On April 4, 2001, the Respondent's Brief in Opposition was sent by U.S. Mail to the Clerk of this Court and a copy of the same was mailed to Robert E. Lee, Jr., Esquire, Virginia Capital Representation Resource Center, Third Floor, 2421 Ivy Road, Charlottesville, Virginia 22903, counsel for petitioner.

_____
Pamela A. Rumpz
Assistant Attorney General

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COMMONWEALTH of VIRGINIA

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April 4, 2001

The Honorable William K. Suter, Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: Atkins v. Commonwealth
No. 00-8452

Dear Mr. Suter:

Please find enclosed the original and ten copies of the Respondent's Supplemental Brief in Opposition, to be filed on behalf of the respondent in the above-referenced case.

Thank you for your assistance in this matter.

Very truly yours,

Pamela A. Rumpz
Assistant Attorney General
Criminal Litigation Section

Enclosures

cc: Robert E. Lee, Jr., Esquire

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No. 00-8452

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Virginia

SUPPLEMENT TO REPLY BRIEF FOR PETITIONER

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4 pp

The issue in the supplement to Atkins' petition for a writ of certiorari was raised below.

Atkins squarely presented the federal constitutional issue in his opening brief to the Supreme Court of Virginia:

> While the 8th Amendment's prohibition against cruel and unusual punishment does not categorically prohibit the imposition of the death penalty on Mr. Atkins because he is mentally retarded, *Penry v. Lynaugh*, 492 U.S. 302(1989), whether or not the death penalty is excessive is to be judged at any given time by the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). . . . [T]oday's society's standards have evolved to the point that imposition of the death penalty on an individual with a 59 IQ who is not eligible for parole is excessive.

Appendix to Petition for Writ of Certiorari ("App.") at 131 (emphasis added).

Virginia, in response, addressed the merits of the precise Eighth Amendment issue in its brief below:

> To the extent that Atkins argues that societal standards of decency have evolved since *Penry* and now prohibit his execution, Atkins has offered absolutely no support for his novel proposition. At the time of the *Penry* decision, *see* 492 U.S. at 340, and today, there simply is no national consensus against execution of the mentally retarded.

App. at 151 n.2 (emphases added).[1]

The Supreme Court of Virginia discussed the merits of this issue in its opinion below:

> Atkins . . . assert[s] that he is mentally retarded and thus cannot be sentenced to death. Quoting from *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Commonwealth . . . contends that execution of a defendant who is mentally retarded does not contravene the practices that were condemned when the Bill of Rights was adopted or the evolving standards of decency. . . . The Supreme Court of the United States has ruled that imposition of the death penalty on a mentally retarded defendant with the approximate reasoning capacity of a seven-year-old child does not violate the Eighth Amendment prohibition against cruel and unusual punishment solely because of the defendant's mental retardation. *Penry*, 492 U.S. at 336.

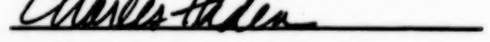
Atkins v. Commonwealth, 534 S.E.2d 312, 318-19 (Va. 2000) ("*Atkins II*"), App. at 25-27 (emphases added).

[1]Virginia argued below, in the alternative, that Atkins' Eighth Amendment claim was defaulted. The Virginia Supreme Court addressed the federal constitutional issue only on the merits. Under the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032, 1042 and n.7 (1983), this Court may reach the federal question on review because the state court's opinion does not contain a plain statement that its decision rested on adequate and independent state grounds.

CONCLUSION

The issue is ripe. For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,



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No. 00-8452

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OCTOBER TERM, 2000

DARYL RENARD ATKINS,
Petitioner-Appellant,

v.

COMMONWEALTH OF VIRGINIA
Respondent-Appellee.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court. I further certify that on April 10, 2001, I caused the foregoing Supplement to Reply Brief for Petitioner to be served by first-class mail, postage prepaid, on Pamela A. Rumpz, Esq., Assistant Attorney General, 900 East Main Street, Richmond, VA 23219.

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COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Virginia

THE RESPONDENT'S MOTION TO DISMISS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

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THE RESPONDENT'S MOTION TO DISMISS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

The Commonwealth of Virginia, by counsel, moves the Court to dismiss the writ of certiorari as improvidently granted for the following reasons:

1. On September 25, 2001, this Court granted Daryl Atkins' petition for a writ of certiorari on three questions presented. The first two questions – concerning alleged evidentiary errors occurring in the penalty phase of Atkins' trial – were raised in Atkins' petition for writ of certiorari. The third question – whether the Eighth Amendment prohibits the imposition of the death penalty on the mentally retarded – was raised for the first time in a "Supplement to Petition for Writ of Certiorari" filed two months after Atkins' petition for a writ of certiorari was due under this Court's rules, and only after this Court had granted certiorari in *McCarver v. North Carolina*, 121 S.Ct. 1401 (2001). On October 1, 2001, this Court issued an amended order limiting the grant of certiorari to the third question: whether execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment.

2. Atkins never raised the Eighth Amendment challenge in any state court. He never alleged in the trial court that the Constitution forbade the death penalty because of his alleged mental retardation. He argued to the jury, as was his right under Virginia Code § 19.2-264.4(B)(vi) and *Penry v. Lynaugh*, 492 U.S. 302 (1989), that his alleged mental retardation mitigated against a death sentence, but he made no motion or argument before, during or after his trial or sentencing that his alleged mental retardation prohibited imposition of the death penalty, much less that the Eighth Amendment forbade the death penalty. Pursuant to Rule 5:22 of the Rules of the Supreme Court of Virginia, Atkins was required to file in the Supreme Court of Virginia "assignments of error upon which he intend[ed] to rely for reversal of his conviction." Atkins, however, listed

no federal issue among his assignments of error. He did not argue the point in his brief. *See Beck v. Washington*, 369 U.S. 541, 553 (1962) (noting that jurisdiction is not proper where error is not assigned to the issue and the matter is not briefed in the state court).[1] In the Supreme Court of Virginia, Atkins argued only that his sentence was disproportionate to other Virginia cases under Virginia Code § 17.1-313 because he was "unable to find a case in Virginia in which an individual with an IQ of 59 has been sentenced to death." (*See* Atkins' direct appeal brief at 11). Atkins made no argument whatsoever in the Supreme Court of Virginia that the Eighth Amendment prohibited imposition of the death penalty on the mentally retarded.

3. The Supreme Court of Virginia, moreover, did not decide any federal issue regarding mental retardation, and certainly not whether the Eighth Amendment prohibits imposition of the death penalty on the mentally retarded. *See Atkins v. Commonwealth*, 534 S.E.2d 312, 318 (Va. 2000) (finding that Atkins argued under § 17.1-313(C) that his sentence was disproportionate to other Virginia cases because his IQ allegedly was lower than any other Virginia death row inmate); *id.* at 320 (holding that, "as part of our proportionality review," the Court must consider all the evidence regarding Atkins' mental functioning); *id.* at 321 (concluding under § 17.1-313(C) that "we cannot say that Atkins' sentence of death is excessive or disproportionate to sentences generally imposed in this Commonwealth for capital murders comparable to Atkins' murder of Nesbitt.").

4. Indeed, Justice Hassell's dissenting opinion below makes expressly clear that the Court was ***not*** deciding any federal issue:

> I recognize that the United States Supreme Court has held that the imposition of the death penalty upon mentally retarded criminal defendants does not violate the Eighth Amendment to the United States Constitution. *See Penry v. Lynaugh*, 492 U.S. 302, 340 (1989). However, ***the issue in this appeal is not whether the imposition of capital punishment upon a mentally retarded defendant violates the federal Constitution.*** Rather, the issue in this appeal is whether under Code § 17.1-313 the imposition of the sentence of death is excessive or disproportionate to the penalty imposed in similar crimes, considering both the crime and the defendant.

Atkins, 534 S.E.2d at 324 (emphasis added). The entire record below, including the brief filed by Atkins and the lower court's full opinion, makes clear that the issue the Supreme Court of Virginia was asked to decide – whether a death sentence in Atkins' case was disproportionate to sentences in other similar Virginia cases – is fundamentally different from the issue of whether the Eighth Amendment categorically prohibits a death penalty on the mentally retarded. *See Hill v. California*, 401 U.S. 797, 805 (1971) (a federal claim cannot be considered by the Court unless it has been either raised in the state court or considered and resolved by the state court.) Significantly, the state law-based nature of Atkins' claim was confirmed when, on rehearing, Atkins urged the Supreme Court of Virginia to "conduct a proper proportionality review" which "accurate[ly] assess[es] the evidence [of mental retardation] in this case." (*See* Atkins' petition for rehearing at 5-6).

5. Atkins' passing reference to *Penry* – made in the midst of his statutory argument that his death sentence was disproportionate to other Virginia cases – was insufficient to alert the Supreme Court of Virginia that it was presented with an Eighth Amendment claim. *See Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550 n.9 (1987) (a mention of "a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim."). In fact, ***Atkins conceded on direct appeal that execution of the***

---

[1] Atkins filed only an opening brief below. He did not file any motions or a reply brief.

mentally retarded was constitutional, and thus implicitly conceded that he had no constitutional complaint. (*See* Atkins' direct appeal brief at 11: "[T]he 8th Amendment's prohibition against cruel and unusual punishment does not categorically prohibit the imposition of the death penalty upon Mr. Atkins because he is mentally retarded".).

6. The single paragraph in the majority's opinion below mentioning *Penry* likewise is not any indication that the court decided any federal issue. The Supreme Court of Virginia stated clearly what the issue was before it – proportionality under § 17.1-313(C) – and then, after recounting the conflicting evidence in Atkins' case regarding retardation, merely restated what the parties had agreed was the holding in *Penry*. *Atkins*, 534 S.E.2d at 319-320. The court merely was making clear that, "[i]n Virginia," unlike in Texas, juries are entitled to consider mental retardation as mitigation evidence. The court's opinion cannot be read as holding that the federal constitutional claim at issue in *Penry* was dispositive of, or even related to, the state law proportionality issue in Atkins' case. Simply put, the Supreme Court of Virginia resolved no federal issue at all; neither was its decision dependent upon federal law.

7. Absent strict adherence to the jurisdictional requirement that the federal question properly be raised in the state court, the important policy considerations underlying the requirement are rendered meaningless. *See Cardinale v. Louisiana*, 394 U.S. 437 (1969) (noting three policy considerations underlying the jurisdictional requirement). First, as noted in *Cardinale*, Atkins' failure to raise the Eighth Amendment claim below deprived the Supreme Court of Virginia of the first opportunity to consider his belated constitutional challenge. This Court has made clear that "it would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Guy E. Adams v. Charlie Frank Robertson, et al.*, 520 U.S. 83, 86 (1997) (dismissing certiorari as improvidently granted because issue not presented to or decided

by Alabama Supreme Court). Second, absent adherence to the jurisdictional requirement, lower courts are not given any opportunity to decide the issue on an adequate and independent state law ground.[2] Finally, adherence to the jurisdictional requirement that the issue properly be raised in the state court insures that the record in the case is "compiled with the [certiorari] question in mind." *Cardinale*, 394 U.S. at 439. In Atkins' case, the record is devoid of any finding by any court that Atkins even is mentally retarded. To the contrary, in conjunction with Atkins' request for various mitigation instructions, the trial court found that Atkins' mental retardation was "legitimately in dispute factually." (*See* Joint Appendix filed in the Supreme Court of Virginia at 777.) And, when the Supreme Court of Virginia conducted its statutorily required proportionality review under Virginia Code § 17.1-313, it discussed the conflicting evidence of Atkins' mental retardation and noted the "sharp disagreement" between the experts at trial about whether Atkins even was mentally retarded. *See Atkins*, 534 S.E.2d at 319-321. The record here is bereft of material upon which this Court could make any principled analysis of the Eighth Amendment issue, a circumstance flowing directly from Atkins' own failure to raise or argue the issue below.

8. The Eighth Amendment question was not presented in the state court with "fair precision and in due time." *Robertson*, 520 U.S. at 88. Neither was it decided below. *Id*. This Court should, as it did in *Robertson*, dismiss the writ of certiorari as improvidently granted.

---

[2] In fact, had Atkins assigned the Eighth Amendment claim as an error and argued it below, there is no doubt that the Supreme Court of Virginia would have applied its contemporaneous objection rule, Rule 5:25, to bar consideration of the claim because Atkins ***never raised it in the trial court***.

Respectfully submitted,

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RELEVANT DOCKET ENTRIES

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PSYCHOLOGICAL EVALUATION (Dr. Brown)	07/06/99
Presentence Report	10/26/99
Exhibits	08/18/99

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF YORK AND THE CITY OF POQUOSON

NOVEMBER 19, 1996

COMMONWEALTH OF VIRGINIA, Plaintiff,	:	A CLASS 1 FELONY DOCKET NO. 8229 INDICTMENT NO. 1
v.	:	
DARYL RENARD ATKINS, DOB: 11-06-77 SS#: 223-47-0073, Defendant.	:	

THE GRAND JURY CHARGES THAT:

On or about August 17, 1996, in the County of York, Virginia, DARYL RENARD ATKINS did feloniously, willfully, deliberately, and premeditatedly kill and murder ERIC MICHAEL NESBITT in the commission of robbery while armed with a deadly weapon.

§ 18.2-31, subparagraph 4, Code of Virginia (1950), as amended Capital murder of victim of robbery

(✓) A TRUE BILL

( ) NOT A TRUE BILL

/s/ Fay Moone
FOREMAN

WITNESS: Inv. F.T. Lyons
York County Sheriff's Department

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF YORK

COMMONWEALTH OF VIRGINIA VS DARYL RENARD ATKINS	:	CASE NO. 96-8229 (6)

Stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and all other incidents during the second day of trial in the above-styled cause, held in the Circuit Court for the County of York at Yorktown, Virginia, on February 10, 1998, before the Honorable Prentis Smiley, Jr., Judge of said Court, and jury.

—oOo—

[150] Phillip E. Atkins

with an X, please.

THE COURT: Okay. Thank you, sir.

BY MR. HAHN:

Q Mr. Atkins, about – are you familiar with where Tower Road is off of Crafford Road?

A Yes.

Q About how far away is your home from where Tower Road intersects with Crafford Road?

A About four blocks.

Q Okay. Can you give it to us in some type of distance, in mileage or yards?

A From Crafford Road, I'd say around – around four blocks.

Q Okay. Now, do you know Daryl Atkins?

A Daryl?

Q Yes, sir.

A Yes.

Q How do you know him? Is he related to you?

A That's my son's son.

Q So he's your grandson?

A I'm the grandfather.

THE COURT: Counsel – ladies and gentlemen of the jury, I'm going to ask that you retire to the jury room at this time. Do not begin any

* * *

[156] And I got my son to help me to – my other two sons, Phillip and Ronnie, helped me on the farm. And he come with – he come with his father.

MR. HAHN: I have no further questions of this witness, your Honor.

THE COURT: Do you wish to examine the witness?

MR. ROGERS: Just one.

CROSS-EXAMINATION

BY MR. ROGERS:

Q Mr. Atkins, about how long ago was that, sir?

A Oh, that's been about – about three years, four years, something like that.

MR. ROGERS: Three years. Thank you, sir, no other questions.

THE COURT: Any further need for Mr. Atkins?

MR. ROGERS: No, sir, he can be excused.

THE COURT: Mr. Hahn, do you wish to call him any further?

MR. HAHN: I do not, your Honor.

* * *

---

[193] Investigator Frederick Troy Lyons

west of the body. There was one casing that was directly underneath the body and there were two casings that were found approximately eight to ten feet off the feet of the body in the area where there were some tire tracks on the loose pavement. And. those casings were embedded in the tire track.

MS. ADDISON: Your Honor, I'd ask that Commonwealth's Exhibits 10 through 18 be admitted into evidence and published to the jury.

MR. ROGERS: No objection, your Honor.

THE COURT: All right. They have been previously marked.

MS. ADDISON: Yes, sir.

THE COURT: Mark them filed as Commonwealth's Exhibits 10 through 18, inclusive, and make them an exhibit, part of the record.

(Commonwealth's Exhibits Number 10 through 18 were received in evidence.)

THE COURT: I'll let you publish them as soon as I initial them. You may go ahead.

BY MS. ADDISON:

Q What was done next in your investigation, Investigator Lyons?

A The casings were collected, assigned

* * *

[198] on August 17th, 1996 for two hundred dollars, which overdrew his bank account.

Q Did you have any further contact with Crestar Bank in the investigation?

A On the 21st of August I received a phone call from the Crestar Bank. After receiving that phone call, I went to their security office in Norfolk, where I was given several copies of still photographs of the transaction Mr. Nesbitt had conducted on August 16th at the ATM machine at the Coliseum Mall Branch of Crestar Bank, and also copies of still photographs from the transaction that occurred shortly after midnight on August 17th of

1996. And I also received the video tape of those transactions.

Q And what, if anything, did you do with that video tape?

A Took the video tape back to our office. On the way back, I dropped off copies of the still photographs to the Hampton and Newport News Police Departments, in hopes of being able to identify the subjects that were in the vehicle with Mr. Nesbitt.

I then took the video tape back to our office, where I made multiple still photographs of captured images from the video tape of the transaction at the ATM machine with the other individuals in the vehicle

* * *

[203] This was a Saturday when we initially talked with the Crestar Bank people. The branches were closed, so they could not contact the branch until Monday. And that took a day through the courier service to get from Coliseum Crossing to their branch in Norfolk.

Q And what information did you receive in response to your request? You mentioned crime line calls.

A Yes, we received a number of crime line calls. Of those crime line calls, five of those calls identified the driver in the video as being William Alfredric Jones and also gave a location where he resided. One of the calls stated that a person that Mr. Jones runs with was a Daryl Atkins, who lived in the same apartment complex.

Q What happened next?

A Based on one of the calls that we received, we obtained an arrest warrant for William Jones in reference to this offense. We went to Mr. Jones' residence, that would be on the 21st – yes, that would have been on the 21st we went to Mr. Jones' residence, interviewed his father and his father's girlfriend.

Following that, we determined where Mr. Atkins lived, went to Mr. Atkins' residence, identified him and placed him under arrest.

* * *

[209] again, I've got to object to this. This is obviously the product of hearsay. It's not subject to any stipulation of the 13 or 14 we've made. And I object to it.

THE COURT: At this point, it's not hearsay. It may be a conclusion.

MR. ROGERS: Oh, it's a conclusion that is totally improper without the foundation being laid, your Honor, and we object to it.

THE COURT: I'll sustain the objection, pending proper foundation.

MR. ROGERS: Thank you, your Honor.

BY MS. ADDISON:

Q Did you subsequently take Mr. Atkins to the York County Jail?

A Yes, ma'am, we did.

Q And what, if anything, happened on that Wednesday, August 21st, in the investigation?

A I don't understand.

Q I'm sorry. Did you subsequently – did you get information regarding Mr. Nesbitt's truck at any point?

A Yes, we did. Approximately 20 minutes after Mr. Atkins was arrested, I received a page notifying me that Eric Nesbitt's truck had been found at the King James Motel in the City of Newport News.

[210] Q And what, if anything, had been done with that truck?

A I had previously, prior to this date, had coordinated with the Newport News Crime Scene Unit for them to assist us with the use of their alternate light source and their garage processing area, if and when we found this vehicle, for the purpose of processing it. I contacted Investigator Monty Willaford with our office, once I was notified the vehicle had been found, and requested that he get in contact with the Newport News Crime Scene Unit in reference to getting this vehicle processed.

Q To the best of your knowledge, was that actually done?

A Yes, it was. It was done that afternoon by Investigator Willaford and Detective Martin with the Newport News Police Department.

Q Did you subsequently also arrest William Jones in this matter?

A Yes, we did. We arrested Mr. Jones on the – I believe it was the – on August 22nd of 1996.

Q You said the truck was processed by Newport News. Did you become involved in the transportation of any of the evidence that was obtained from that truck?

* * *

[215] submitted Eric Nesbitt's blood-stained shirt. I submitted shoes that were recovered from Daryl Atkins' apartment that had a red stain in them. I submitted a blood sample that was drawn from Daryl Atkins.

Q Any other blood samples?

A When I got to the lab on August 28th to submit these items, I secured the blood sample drawn by the Medical Examiner of Eric Nesbitt's blood and submitted that, also.

Q Where did you take that from, the blood sample from Eric Nesbitt?

A I obtained it from the Medical Examiner's Office, which is in the basement of the Consolidated Laboratory Building in Norfolk.

Q Did you have occasion to have any further contact with Daryl Atkins on or about September 11th of 1996?

A Yes, I did. I accompanied Mr. Atkins, myself and Investigator Monty Willaford, to Mary Immaculate Hospital, where he underwent surgery to have the bullet removed from his leg.

Q And did you, in fact, witness that surgery?

A Yes, I did. I attended the surgery, was in the operating room. Dr. Boyd Haynes was the

* * *

[226] Investigator Frederick Troy Lyons – Cross

testimony, as I recall, Investigator Lyons, was that you got the ATM tape and the stills on the 21st of August of 1996, is that right?

A I misspoke on that. They were aired in the newspaper on the 21st. I received the item on the 20th, received the tape on the 20th and made the stills on the 20th.

Q Okay. Thank you. Okay, so then it was aired on the 21st?

A It was aired on the eleven o'clock news on the 20th and appeared in the newspaper and aired again on the 21st.

Q Okay, that would be the Daily Press, morning edition, on the 21st?

A Yes, sir.

Q Okay. Now, the – you testified that you arrested Mr. Atkins. That also occurred on the same day, is that right, August 21st?

A Yes, sir.

Q Okay. And at the time that you arrested him, you said that it was at an apartment, is that correct, at Sacramento?

A I believe the name of the apartment was Tidemill Apartments.

Q Right. But it's off of Sacramento

* * *

[229] Investigator Lyons? You're a nine-year veteran of the York County Police Department.

MS. ADDISON: I object. That's argumentative, and it's not a question.

THE COURT: Well, the unique part about this process is the lawyers get to ask the questions and the witness gets to answer. So I will permit the question, okay?

THE WITNESS: He didn't resist us or anything of that nature. I guess you could say he was, you know, he was cooperative in that he didn't resist or – or try to avoid anything.

BY MR. ROGERS:

Q And he made a detailed statement to you, did he not?

A Yes, sir.

Q Okay. And this was done on the 21st of August, 1996, at 3:30 p.m., is that correct, when it began?

A No, sir, it was earlier than 3:30.

Q Could you check your file? Excuse me, Investigator, do you have – Lyons, do you have the typed-up interview report –

MS. ADDISON: Your Honor, I'm going to object.

[230] MR. ROGERS: – of August 21, 1996?

THE COURT: There's an objection.

THE WITNESS: Yes, sir, I do.

THE COURT: There's an objection.

MS. ADDISON: I'm not sure where Mr. Rogers is going with this. We object to the admission of evidence regarding this statement as far as its content.

THE COURT: He didn't ask about the content. To my knowledge, he hasn't asked about the content.

BY MR. ROGERS:

Q Do you have it?

A Yes, sir, I do.

Q Okay. Does it show a date of August 21, 1996?

A Yes, sir, it does.

Q And that's Case Number 96 space 08 space 197?

A I don't have a case number listed on the interview.

Q Okay. Do you show a day, Wednesday; time, 3:30 p.m.?

A No, sir, I do not.

Q Do not?

[231] A No, sir.

Q Do you have the typed interview that you had with Daryl Atkins on that date?

A Yes, sir, I do.

Q Okay. How many pages is it, sir?

A Thirty-one.

Q Thirty-one pages?

A Yes, sir.

Q And what time did that interview end?

A This interview with Mr. Atkins, if I recall, we started – it started approximately ten o'clock in the morning and I believe we were finished by noon.

Q Okay. Do you have – yeah, 12:21 p.m. would be 12 – twenty-one minutes after noon?

A Okay.

Q Okay. Daryl Atkins, in fact, Investigator Lyons, denied shooting –

MS. ADDISON: Objection, your Honor.

BY MR. ROGERS:

Q – Eric Nesbitt, did he not?

THE COURT: There is an objection to the question.

Do you need to have this matter taken up outside the presence of the jury?

MS. ADDISON: Yes, sir.

* * *

[Argument To Judge]

[239] made completely against Mr. Atkins' penal interests.

MS. ADDISON: Your Honor, even Mr. – anyone would understand at the time that they are less culpable and less responsible if they are not the one that pulled the trigger. He knew it then and he knows it now, and his story hasn't changed.

MR. HAHN: It's important not to blend the two rules, one a declaration against interests, which has somewhat slightly different rules because it's not a party. What we've got here is a party admission.

THE COURT: Party admissions, generally speaking, are civil in nature.

MR. HAHN: Well, Friend says that when there is a party to the action, whether it be criminal defendant or plaintiff or civil defendant, it's properly more precise to call it a party admission. When it's a stranger to the action it's a declaration against interests.

THE COURT: Right. And the Court considers the totality of the evidence before it, okay, and the development of that evidence by the direct and cross-examination of this witness. And under the circumstances prevailing at the time the statement was made, the Court finds that the statement is admissible.

Note the exception of the

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[244] with William Jones in the commission of these things." And he's got all kinds of statements concerning

what he and William Jones did that whole day through the events of the robbery, the abduction, the shooting, him being shot, going to Riverside Hospital, and all the way through that point.

MS. ADDISON: Your Honor, he also said that he hasn't touched a gun in two-and-a-half years, that he was abducted himself by William Jones and forced to get in the truck with Eric Nesbitt. He denies ever having the gun in his hand. He later admits that he did have the gun only because he was told to hold it.

THE COURT: So what? I mean, what about – the concern of the Court is opening the door further to other crimes which may –

MR. ROGERS: Speaking for the Defense your Honor, we're not concerned about that.

THE COURT: Well, the Commonwealth – the Court hasn't read the statement.

MR. ROGERS: Oh, I understand that.

THE COURT: And what the Commonwealth indicates to the Court is that it opens up many other aspects of other crimes that are not necessarily covered in this statement, the investigation of other crimes. And are you waiving that insofar as putting all that evidence

* * *

[246] admitted his role in the crime.

MS. ADDISON: No, sir, he denied that he pulled the trigger, and that is the issue before this Court and before this jury. That is the issue. And certainly Daryl Atkins knows now and he knew the day he made that

statement that that made him less culpable if he was not the one who pulled the trigger. And that was the purpose for making the statement then, and that's the purpose for wanting it in before this jury now without subjecting himself to cross-examination, without us being allowed to say he has been convicted of 22 felonies and you can consider that in considering whether or not he's telling you the truth.

MR. ROGERS: The only brief response on that, if the Court please, first there is no indication – in fact, I would make a proffer that based consistently with what Investigator Lyons said about arresting him and questioning him the same day, he had no attorney at that time. He didn't have legal advice on what was going on.

MS. ADDISON: He moved to suppress.

MR. ROGERS: And that's not the problem. The Commonwealth can't have it both ways. The Court has made a ruling. Now, first the Commonwealth wants to protect him from other crimes, then says, no, we

* * *

[Court Ruling]
[February 11, 1998]

[10] prejudice which may be involved.

So again we have general principles, if the Court please, that the Defense does not feel has been specifically determined by a case on all fours in the Commonwealth of Virginia.

In the same section, we deal with self-serving declarations. I won't read that, if the Court please, but it shows some – on prior consistent statements, self-serving declarations in Section 18.4, just make reference of that for the record, if the Court please. And the cases cited there only – thereunder.

But that would be our only argument, if the Court please.

THE COURT: All right. Thank you, Mr. Rogers.

MR. ROGERS: Yes, sir.

THE COURT: The Court finds that the principle is so fundamentally sound in Virginia that there are very few cases that would be on point. The Court would find that your argument for exceptions is not founded, that no exception exists for this out-of-Court statement of the Defendant offered through another person, another witness.

I would, therefore, sustain the Commonwealth's objection to the question, and the answer

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[36] Officer Anthony T. Tutone

dark ski mask. The person asked him for some money. And he started running north, which would be north toward the Denbigh area of Newport News.

When he reached the entrance to the Deer Park his left foot started hurting him, and he looked down and he

realized that he had been shot. I asked him if he had heard any gunshots or anything like that. He said no.

Then I asked him how he got to Riverside. He told me that he had hopped all the way to Riverside Hospital.

Q How long a distance is that?

A It's approximately a mile and eight-tenths.

Q Okay.

A At that time I asked him again if he could supply me with any information as – for a description. He stated he couldn't, it was just a dark ski mask. And that was all the conversation I had with him.

Q Were you able to make any observations concerning his state, or lack thereof, of intoxication?

A I didn't observe any odor of alcohol coming from him. He was laying on the stretcher, appeared to me to be calm. He was in pain. He kept complaining

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[43] Doctor Ozita D. Cooper

to the Commonwealth Attorney and presented to the witness.)

BY MR. HAHN:

Q Doctor Cooper, would you look at those Exhibits 39 and 40, please, and tell us if you recognize them?

A These were the x-rays taken of Daryl Atkins.

Q Now, did you yourself render any medical treatment to Mr. Atkins, other than the emergency room, or was he referred to someone else?

A He had emergency room treatment, which consisted of x-rays, initial evaluation, vital signs, antibiotics, ice to the injured area, pain medication, splinting of the extremity.

Q And do you recollect or do your records indicate what Mr. Atkins' demeanor was during this treatment at the emergency room?

A He was pleasant and appropriate.

MR. HAHN: May I consult with counsel, your Honor?

THE COURT: You may.

(The Commonwealth Attorneys conferred.)

MR. HAHN: The Commonwealth has no

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[48] Q Okay. Could you – and how many is that?

A We only saw two wounds in his left lower extremity.

Q Okay. Did – did either one of those show what would be described as a through-and-through wound, thus having an entry and an exit?

A On initial examination, we felt that he had those two wounds, one was an entry and the other was an exit.

Q Okay. And how about the – how about the second wound?

A We only identified two wounds in his extremity, one was the entrance and the other one was the exit that we decided.

Q Okay. Did you – you saw from the x-rays that there was a bullet lodged next to one of the bones as shown in the x-rays, is that right?

A That's correct.

Q So that was a bullet still inside?

A That's correct.

Q And you saw an entry wound that led to where that bullet was, is that right?

A In a close approximation, yes.

Q Okay. Now, did you see another wound?

* * *

[51] punctures in the skin that we initially identified.

Q Okay. What, if anything, did you identify later through that ER chart and your examination of Mr. Atkins that night?

A After reviewing the x-rays, we saw a bullet.

Q Okay.

A That led us to a question whether there was another wound.

Q Okay.

A Or did he have a previous injury.

Q Okay. Now, from the diagram, the wounds that you saw, on what leg, you said the lower extremity, for us laymen that means a leg, is that right?

A Yes.

Q On what side – which leg were the wounds?

A They were on the left lower leg.

Q On the left leg. And on the left leg, were they on the inside portion of the leg, the left leg, or the outside portion of the left leg of Daryl Atkins?

A One was on the inside portion, the other was on the outside portion.

Q Okay. The part that was on the inside portion, would you describe that as an entrance wound or [52] as an exit wound?

MS. ADDISON: Your Honor, again, I don't believe there is foundation for this witness' expertise to determine that.

THE COURT: Testifying from the chart that you provided her, I'm going to overrule the Commonwealth's objection.

BY MR. ROGERS:

Q Okay. Which side was the entry wound, Doctor Cooper, if you can determine that?

A As noted on the chart, the smaller, inside wound was the entrance wound.

Q Okay. So the entrance wound was on the inside of the lower left leg?

A That's correct.

Q Okay. And the exit wound would be where?

A On the outside leg.

MR. ROGERS: On the outside of the lower left leg. Okay.

Thank you, very much, Doctor. I appreciate your assistance.

THE COURT: Any redirect of Doctor Cooper?

MS. ADDISON: Just briefly.

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[68] Jacquelyn McIntyre

A That morning the client presented in the emergency department hopping on one foot. He came in, and at the time I had been back in the treatment area taking another patient back, and I had just come out into the triage area. We were meeting each other face-to-face.

Q Yes, ma'am.

A And he hopped up to me, and I said, "Did you hurt your ankle?" And he said, "I've been shot." And I said, "Come on, let's sit down." And he put his arm around my shoulder and I helped him to the seat. And I summoned for a wheel chair.

And at the time I was getting, you know, assessing the mechanism of injury or, you know, how the injury

was precipitated. And I, you know, I asked him, "You say you were shot," you know, "where and what happened?" And he said, "I was shot right outside the hospital." And I said, "In front of the hospital?" And he said, "Yes."

Q Okay. Did he give you any explanation other than that?

A When I asked him, I said, "Were you robbed?" And he said, "No, I got away." And I said, "You say you were right in front of the hospital when this happened and you hopped all the way here to the emergency department?" And he said, "Yes."

[69] Q Okay. Did he have anything around the wound or anything?

A He had the wound, as I recall, wrapped with a towel around his ankle. And I unwrapped the towel just briefly enough to assess that there was the presence of a bloody ankle, and I could not determine the amount of wounds that were present, but there was some blood in the area. And I was looking for a deformity in the presence of a pulse in the foot.

Q Did Mr. Atkins give you any explanation how he managed to come across a towel between the front of the hospital and the ER entrance?

A No, he didn't.

Q How would you assess his demeanor?

A On his presentation to the emergency department, he was calm, very cooperative. He – he was a person that was appearing to want my help for something. He was coming to me for help. He was not

demanding, I guess I'm trying to say, as, you know, most people would be. He was not demanding. He was reaching out to me. You know, like he was in a form of help me.

Q Okay. Did he show any fear?

A No.

Q No excitement or anything of that nature?

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[107] Doctor Leah Bush – Cross

Q Doctor Bush, on the – while you have the x-rays there, Commonwealth Exhibits 39 and 40, can you tell from those x-rays the direction, whether the direction of entry of the two wounds are the same or if they are from opposite directions on that leg?

A It would appear that they both may be coming this way (indicating). I can't say for sure, but that's the appearance, my impression.

Q Okay.

THE COURT: Excuse me, counselor, the record is absent any direction when she's pointing.

MR. ROGERS: I'm sorry.

THE WITNESS: Excuse me, sir.

MR. ROGERS: If you can identify – excuse me, your Honor.

BY MR. ROGERS:

Q If you could identify the Exhibit Number and then point to it, whether it's entering from the left or right side.

A This is Exhibit Number 39. It would appear that the bullets are coming from this side (indicating), the large bone or tibia.

Q Which one is this, the left or right?

A Oh, I'm sorry, it's the left.

Q Okay.

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this case I turned everything in to Property and Evidence and Investigator Lyons checked them out and took custody of them his self.

Q And when you took the samples of the seat covers, cut those out, did you air-dry those at the office also? Did you air-dry those at the office?

A Yes, sir.

MR. SAUNDERS: All right. May I see Commonwealth's Exhibit Number – Numbers 52 and 53, your Honor.

THE COURT: They are being published.

MR. SAUNDERS: Oh, I'm sorry.

BY MR. SAUNDERS:

Q Okay. When you – you collected swab number 24, your Item 24 –

A Taken from the driver's door, the lower half section, is that the –

Q That's correct. At that particular point in time on August the 21st, did you have any difficulty in opening the driver's door?

A I could not from the outside. I had to from the inside.

Q From the inside you could open the door?

A Yes, sir.

[198] Q Now, you examined the interior of the vehicle thoroughly, did you not, Mr. Martin?

A As thoroughly as I could, yes, sir.

Q And you've told us about the items that you recovered, is that correct?

A Yes, sir.

Q So you did not recover any weapon of any nature in the vehicle?

A No, sir.

Q All right. Now, of course, the only thing you can actually tell us is that you went and looked at this vehicle on August the 21st, 1996 and what you found. You don't know what happened to the vehicle between the 17th and the 21st, is that correct?

A No, sir.

MR. SAUNDERS: Excuse me. May I consult for a moment?

THE COURT: That's a typical question, is that correct. No, sir.

MR. ROGERS: Rephrase it.

THE COURT: It's not correct, he says. The primary question was correct. He answered that correctly. When you added that other one, it's going to confuse the record.

MR. SAUNDERS: I'm not trying to

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[215] John G. Ward

turned either to the right or to the left. We refer to the grooves as grooves and the original surface of the land – of the barrel as land impressions.

In this case here we had six lands and grooves to the right-hand direction of twist. I examined all six barrels in conjunction with each other – excuse me, all six bullets in conjunction with each other and determined there was sufficient, unique individual characteristics to conclude that they had been fired from the same barrel.

Q Was your examination able to tell you what specific make of firearm it would have been that fired these bullets?

A I can't tell you a specific make. We do know from years of research and tabulating the rifling characteristics measurement, the widths of these lands and grooves and the direction of twists and the occurring number of lands and grooves, there has been compiled by the Federal Bureau of Investigation a computer program to which we refer to, and it will tell us and give us a list of firearms that we can use as an investigative aid for the department of the type of firearm it may be used from. It's not all inclusive but it does tell us some of the firearms that have barrels that are consistent with those that we're looking for.

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[77] Richard Martin

[February 12, 1998]

of Eric Nesbitt's truck when it was discovered, is that correct?

A Yes, I did.

Q During your search of that vehicle, were you able to find any type of firearm?

A No, sir.

Q Okay. Now, also, when you were able – when you were processing the truck, were you able to open the driver's side door at that time to assist you?

A Not from the outside, just from the inside.

MR. HAHN: Okay. I'd ask the Bailiff to show the witness this exhibit – or it needs to be marked, first.

THE COURT: Mark it, please, Commonwealth Exhibit 68.

(Commonwealth's Exhibit Number 68 was marked for identification.)

BY MR. HAHN:

Q You recognize that photograph, Mr. Martin?

A Yes, I do.

Q Is that one that you took during the processing of the vehicle?

A Yes, sir.

* * *

CROSS-EXAMINATION

BY MR. ROGERS:

Q You didn't have any difficulty opening the driver's door from the inside, did you?

A No, sir.

Q Okay. Do you know where the truck has been? You saw this back, where, August the 21st, as I recall, in 1996?

A Yes, sir.

Q Okay. Do you know where it's been since then?

A Well, for a while it was kept in the City Farm impound lot located in the City of Newport News. And

when it was removed, I don't know the exact time or date, and then the last time I saw it it was here in York County.

Q Okay. And when it was kept at the impound lot at the City Farm in Newport News, this is not in a covered garage area, this is out in the open?

A Yes, sir.

Q And likewise the – where you saw it in York County, that likewise was not in a covered garage, it was out in the open, is that right?

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[97] William A. Jones

We'll continue.

Call your next witness.

MS. ADDISON: Commonwealth would call William Jones.

THE COURT: William Jones.

(The witness was duly sworn.)

WILLIAM A. JONES,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Would you state your name for the record, please.

A William A. Jones.

Q Mr. Jones, if you can speak up a ittle bit into the microphone, make sure everyone can hear you.

How old are you, Mr. Jones?

A Twenty-eight.

Q And where do you currently live?

[98] A In jail, Virginia Peninsula Regional Jail.

Q And how long have you been in jail?

A About seventeen months.

Q Where did you reside before going to jail?

A In Hampton.

Q Directing your attention, Mr. Jones, behind you to your right is what has previously been marked as Commonwealth's Exhibit 4, the large photograph with the two smaller photographs on top. Have you seen that before?

A Yes, I have.

Q Do you recognize that area?

A Yes, it's Hampton.

Q Can you indicate on there where in Hampton you were living prior to going to jail?

There is a pointer right in front of you there, if you need to use that?

A Sacramento Apartments.

Q Is that shown on that Exhibit Number 4?

A It's in red (indicating).

THE COURT: The witness is pointing to the top part of the exhibit, which is outlined in red.

[99] BY MS. ADDISON:

Q And how long did you live in Sacramento Apartments?

A About four months.

Q Do you remember when that was?

A In '96, about May – March, February, somewhere in there.

Q Who did you live there with?

A My father.

Q Were you employed when you lived there with your father before going to jail?

A Yes, I was.

Q Where were you employed?

A Golden Corral.

Q What did you do there?

A Washed dishes.

Q How long were you employed by Golden Corral?

A About two months.

Q Up until you went to jail?

A Yes.

Q Mr. Jones, why is it that you went to jail in August of 1996?

A I was involved in a murder, robbery, abduction.

[100] Q Do you know the name of the victim in that case?

A Mr. Nesbitt.

Q What is the status of those charges today?

A I pleaded guilty.

Q What did you plead guilty to?

A Abduction, robbery, murder, three firearm charges.

Q Why did you do that?

A Because I was guilty.

MS. ADDISON: If I might have the next numbered exhibit, I believe it's 68, the document.

THE CLERK: It's 69.

MS. ADDISON: 69. If you could hand that to Mr. Jones.

BY MS. ADDISON:

Q Mr. Jones, the Bailiff is going to hand you a document that's been marked as Commonwealth's Exhibit Number 69. Do you recognize that document?

A Yes, I do.

Q Directing your attention to the last page of that document, there are some signatures that appear there?

A Yes, it is.

[101] Q Do you recognize any of those signatures?

A Yes, I do.

Q Whose?

A My signature, my lawyer's signature, and the Commonwealth's signature.

Q What is that document?

A Supposed to be my plea agreement.

Q It's supposed to be? Have you seen it before?

A Yes, I have.

Q Do you understand what it says?

A Yes, I do.

Q What is that? I'm not asking you to read the entire document, but what's your understanding of that agreement?

A If I tell the truth, the Commonwealth would take the robbery, abduction and two firearm charges, which would leave me with murder and one firearm charge.

Q What is your understanding of what's expected of you here today?

A To tell the truth.

Q What do you expect to happen as far as sentencing on those charges?

A Excuse me? I don't understand.

[102] Q Do you have an agreement as to what you will be sentenced to on those charges?

A Yes.

Q What is that agreement?

A Just that I will be charged with – you will drop the following charge I just stated.

Q Have you been sentenced on any of those charges yet?

A No, I haven't.

Q Do you know what your sentence will be?

A No, I do not.

Q Other than those charges that you have pled guilty to, have you ever been convicted of a felony before?

A No, I have not.

Q Have you ever been convicted of a misdemeanor involving stealing or lying?

A No, I haven't.

MS. ADDISON: Your Honor, if I might –

BY MS. ADDISON:

Q Behind you, directly behind you, Mr. Jones, it's the smallest of those three items, there is one marked

Commonwealth's Exhibit Number 3 – that's [103] it. Do you recognize that photograph?

A Yes, I do.

Q And what is that a photograph of?

A Me, Mr. Nesbitt and Mr. Atkins.

Q Mr. Atkins? Where are each of those people in that photograph?

A I'm driving. Mr. Nesbitt in the middle, and Mr. Atkins in the passenger side.

Q How is it that you know Mr. Atkins?

A I used to live by him in Sacramento.

Q Do you see him in the Courtroom here today?

A Yes, I do.

Q Point him out, please.

(The witness indicated the Defendant.)

THE COURT: The witness is pointing to the Defendant.

BY MS. ADDISON:

Q Do you recall when that photograph was taken?

A Yes, I do.

Q And when was that?

A August 16th or the 17th.

Q Do you recall approximately what time [104] it was?

A Well, it's got it stated up there, 12:32.

Q And where was that photograph taken?

A In Hampton at a bank, Crestar.

Q Whereabouts, near the bank or in the bank or outside the bank?

A Outside the bank, in the driver's window.

Q In the drive-through window?

A Yes.

Q Directing your attention again to that big aerial map, which is Commonwealth's Exhibit 4, and the two photographs, two enlarged photographs that are over the top of that, that have been previously marked as Commonwealth's Exhibit Number 38 and 37, can you indicate on there where, if you know, Mr. Atkins lived in August of 1996?

A Yes, I can (indicating on map).

Q Is that the Sacramento Apartments, as well?

A Yes, it is.

THE COURT: The witness pointed to the same basic area that he pointed to earlier, the top side of the exhibit, which is also marked in red.

[105] BY MS. ADDISON:

Q Did he live in the same or a different building than you lived in?

A A different building.

Q How is it that you came to know Daryl Atkins?

A I met him at the bus stop.

Q Do you recall when that was?

A I don't – maybe two months before this happened.

Q You never worked with him?

A No, I haven't.

Q Well, how would you describe your relationship with him?

A I guess a drinking buddy type of thing.

Q In the summer of 1996, approximately how often did you see him, Mr. Atkins?

A Basically, it was on the weekends when I wasn't visiting my kids and wife.

Q Did you see Daryl Atkins on Friday, August 16th of 1996?

A Yes, I did.

Q When did you first see him?

A About 11:30, twelve o'clock.

[106] Q In the evening or the daytime?

A Daytime.

Q And where was that?

A At his house, his father's house.

Q How long on that day were you together with Mr. Atkins?

A All day.

Q From eleven or twelve until when?

A Until about one at night.

Q One the following morning?

A Yes.

Q And what is it that you and Mr. Atkins did throughout that day and evening?

A We was drinking and smoking weed.

Q What were you drinking?

A Beer and some gin and juice premixed.

Q Did you do anything else while you were at his apartment?

A Just smoked weed and just watched TV.

Q Did you have anything to eat?

A Not that I can recall.

Q Do you recall approximately how much it is you had to drink?

A I had approximately – probably about six or seven 40-ounces, 32-ounces.

[107] Q Of beer?

A Yes, it was.

Q Anything else that you had to drink?

A Two bottles of premixed gin and juice.

Q Was there anyone else there other than you and Mr. Atkins?

A A couple of his friends came by, in and out.

Q Did you know who those people were?

A By face, but I didn't know their names.

Q Do you now know any of their names?

A One, just Mark.

Q Do you recall approximately how long Mark was there?

A Not approximately. But he was there around, I don't know, 10:30, eleven o'clock.

Q Is that in the morning or the evening?

A That was at night.

Q During that entire day and evening, did you ever leave the apartment?

A Yes, we did.

Q When did you first leave the apartment?

A About 12:30.

[108] Q Around noon?

A Yes, it was.

Q And where did you go then?

A Went to 7-Eleven.

Q Is that 7-Eleven indicated on that aerial map marked as Commonwealth's Exhibit Number 4?

A Yes, it is.

Q Can you indicate where that is? (The witness pointed on the map.)

THE COURT: The witness is indicating to a point approximately eight inches below the red outlined area on the top part of Exhibit 4.

BY MS. ADDISON:

Q I'm sorry, Mr. Jones, if you could, the enlarged photograph that is next to where you just indicated, that's been marked Commonwealth's Exhibit 38, do you recognize that photograph?

A Yes, I do.

Q And what is that a photograph of?

A 7-Eleven, video store and Soaps-N-Suds.

Q Does that accurately depict the appearance of that 7-Eleven and shopping center it's in?

A Yes, it did.

[109] Q You said you first went there at noon or 12:30 on August 16th?

A Yes.

Q Why did you go there the first time?

A Me and Mr. Atkins went to get some beer.

Q How did you get from his apartment to that 7-Eleven?

A We walked.

Q Did you go anywhere else anytime that day?

A Went to the ABC Store.

Q How did you get to the ABC Store?

A One of Mr. Atkins' friends drove us.

Q What was the purpose of that trip?

A To go get some liquor.

Q Did you, in fact, buy liquor at the ABC Store?

A I did.

Q Do you recall what it was that you bought?

A Some gin and juice premixed.

Q Premixed?

A Premixed.

Q Do you recall where the money came [110] from that you used to buy the beer at the 7-Eleven and the gin and juice at the ABC Store?

A Most time we all pitched in.

Q You all buy – who do you mean?

A Well, whoever was at the house at the time.

Q Did that include Daryl Atkins?

A Yes, it did.

Q On every occasion?

A Just about.

Q How many times did you go to the 7-Eleven during that day and evening?

A Probably was about four or five.

Q Each time did you make a purchase?

A Yes, I did.

Q What did you buy there?

A The beer and some blunts and some cigar paper.

Q Throughout that day and evening, Mr. Jones, did you ever see anyone with a gun?

A Mark brought a gun about 11:30 at night.

Q Where were you when that happened?

A At Mr. Atkins' house.

Q Did you actually see him with a gun?

[111] A Yes, I did.

Q And did you see what, if anything, he did with that gun?

A He gave it to Mr. Atkins.

Q Was there any conversation about the gun?

A Just that he wanted to use it, he would bring it back in the morning.

Q Who wanted to use it?

A Mr. Atkins wanted to use it.

Q The last time you went to the 7-Eleven Store, do you know about what time that was?

A About 11:30.

Q Eleven-thirty at night?

A Yes, it was.

Q Was that before or after Mark gave Daryl Atkins the gun?

A That was after.

Q And how did you get to the 7-Eleven?

A We walked.

Q Who is we?

A Me and Mr. Atkins.

Q Did anyone else go with you?

A No, they did not.

Q Do you know where the gun was on that [112] trip to the 7-Eleven?

A Mr. Atkins had it in his – in his pants in a belt buckle.

Q Do you recall what the gun looked like?

A Just a brown-handled black gun.

Q Did you ever have that gun in your possession on that trip to 7-Eleven?

A No, I did not.

Q But you saw it?

A I saw it.

Q Did you and Daryl Atkins have any conversation about the gun?

A No, we did not.

Q This Mark that originally brought the gun there, do you know his last name?

A Now I do.

Q Did you at the time?

A No, I did not.

Q Was he a friend of yours or a friend of Mr. Atkins?

A He was a friend of Mr. Atkins.

Q Had you met him before that day?

A Yes, I have.

Q Where?

[113] A At Mr. Atkins' house.

Q When you got to the 7-Eleven that last time, what did you do?

A Well, time we got there, Mr. Atkins told me that he didn't have enough money to get beer, and I had brought my dollar and fifty. I was going to get me one, and he said wait, he was going to panhandle and get some change up.

Q He was going to do what to get change up?

A Panhandle, ask people for money.

Q And so if you could indicate again on that photograph on the front there that shows the 7-Eleven and the shopping center, Commonwealth Exhibit Number 38, where you both were when you got to the 7-Eleven?

A I was right about here at the corner of Soaps-N-Suds (indicating on map). He was right in here toward the 7-Eleven.

Q Right in front of the 7-Eleven?

A Sometimes.

THE COURT: The Court is unable to make a determination of where he was pointing.

MS. ADDISON: Unable to –

THE COURT: Unable to make a determination to recite it to the record.

[114] MS. ADDISON: Your Honor, I can, if the Court would prefer, on Commonwealth Exhibit Number 38, Mr. Jones indicated that he was standing in front of the Soaps-N-Suds, which is on the far left-hand corner of that photograph, that Mr. Atkins was standing near the front entrance of the 7-Eleven, which is approximately in the middle of that photograph.

THE COURT: Is that a fair statement, Counselor?

MR. ROGERS: Yes, sir.

THE COURT: All right. Thank you.

BY MS. ADDISON:

Q What happened when you got to the 7-Eleven, Mr. Jones?

A He started asking people for money. Mr. Atkins started asking people for money. And I waited at the corner of Soaps-N-Suds until he got it up, and I was going to go in the 7-Eleven and buy the beer.

Q Did you see him actually get any money from anyone?

A Yes, I did.

Q Do you recall how many people gave him money or how much he got, if you know?

A I don't know how much he got. But probably one or two people give him some change.

[115] Q Did you ever see him take the gun out while he was getting money from those people?

A No, I did not.

Q And what happened next?

A Then Eric Nesbitt came up in the truck. He parked his truck. Him and Mr. Atkins had a conversation. Mr. Nesbitt went on into the 7-Eleven. I don't know how long. Then he came out.

Q You say Mr. Nesbitt. Now, did you know him at that time?

A No, I did not.

Q Had you ever seen him before?

A No, I hadn't.

Q I'm going to ask that the Bailiff hand you what has been previously marked as Commonwealth's Exhibit Number 2 and ask if you recognize what that is a photograph of.

A It's Mr. Nesbitt's truck.

Q The same truck that you saw pull into the 7-Eleven?

A Yes, it is.

Q Does it in that photograph appear to be differently than it did when you saw it pull into the 7-Eleven?

A Well, the driver's side wasn't [116] wrecked.

Q The driver's side wasn't wrecked?

A No.

Q I'm sorry, I didn't hear you. I'm sorry. I'm just repeating what I thought you said. All right. There is damage shown in that photograph?

A Yes, it is.

Q And where does that photograph show damage?

A On the driver's side.

Q You said that Daryl Atkins spoke with Mr. Nesbitt before he went into the store?

A Yes, he did.

Q Could you hear what he was saying?

A No, I couldn't.

Q Could you hear if Mr. Nesbitt said anything back to him?

A No, I could not.

Q Were you still there to see whether or not Eric Nesbitt came out of the 7-Eleven?

A Yes, I was.

Q Did you, in fact, see him come out?

A Yes, I did.

Q Did you move at any time from in front of the Soaps-N-Suds, that you indicated, while Mr. Nesbitt [117] was in the store?

A No, I did not.

Q Did you have any conversation with Mr. Atkins while Mr. Nesbitt was inside the store?

A No, I did not.

Q So when he came out of the store you were still as you indicated before?

A Yes, I was.

Q And where was Daryl Atkins?

A He was still by 7-Eleven.

Q What happened then?

A Then Mr. Nesbitt backed out and was getting ready to get on Armistead. But Mr. Atkins whistled at him, so Mr. Nesbitt stopped the truck. Mr. Atkins went to the passenger side and I guess Mr. Nesbitt rolled down the window and they started talking. And then I went around to the driver's side.

Q Do you know about how long that was that they were talking before you went to the driver's side?

A At least two or three minutes.

Q Why did you go to the driver's side when you did?

A I just wanted to hear what he was talking about.

[118] Q What did you see when you walked up to the driver's side?

A Mr. Atkins had the gun on Mr. Nesbitt.

Q Had the gun on him how?

A Pointing at him.

Q Were they both inside or outside the truck?

A Excuse me?

Q Where were they? Were they both inside the truck or one out, one in?

A Mr. Nesbitt was in the truck on the driver's side. Mr. Atkins was on the passenger side outside the door.

Q And what happened next?

A Then when I was there, he said, "Move over, let my friend drive." So –

Q Who said that?

A Mr. Atkins. Excuse me.

Q He said what?

A "Let my friend drive." So I got in and Mr. Nesbitt scooted over to the middle and Mr. Atkins got into the passenger side.

Q Did you have any difficulty opening the driver's side door?

A No, I did not.

[119] Q Did you realize at that point that you were involved in a robbery?

A At that point, yes.

Q What happened next?

A Then we drove off, went to the back of 7-Eleven, where some houses were.

Q Ask if you could, Mr. Jones, maybe at this point it would be easier to remain standing next to that aerial photograph, if you can indicate for the jury where you went from there.

A Yes, I can.

(The witness stepped down from the witness stand.)

BY MS. ADDISON:

Q Speak up, please. And when you pulled out of the 7-Eleven, which direction did you go?

A Went left, we turned at Deerfield Road, went down to the apartments behind the 7-Eleven.

MR. ROGERS: Speak up a little bit, Mr. Jones.

MS. ADDISON: Yeah, there you go. Turn this way.

THE WITNESS: We left 7-Eleven and went down to the light, turned left to Deer Run Road, went into the housing area back here, where I hit a car.

[120] BY MS. ADDISON:

Q Where you hit a car?

A A parked vehicle.

Q How did that happen that you hit that parked vehicle?

A The truck slid. It was wet outside.

Q Did anyone grab the steering wheel and cause that to happen?

A No, they did not.

Q What was Mr. Atkins doing and Mr. Nesbitt doing when you drove back into the residential area?

A Mr. Atkins was talking about the radio, CD player that Mr. Nesbitt had. Mr. Nesbitt wasn't saying nothing at that point.

Q What happened while you were back in the residential area, after you hit the parked car?

A After I hit it, we just came back out, came back to Deer Run at the light.

Q At any point from the time you left the 7-Eleven until when you came out of that residential area, did anyone take any of Mr. Nesbitt's money?

A Yes.

Q Who was that?

A Mr. Atkins asked Mr. Nesbitt, asked [121] him did he have any money. He pulled out some money from his pocket, I believe, and gave it to Mr. Atkins.

Q Did you get any of that money right then?

A No, I did not.

Q And what happened next?

A After that, it must not have been enough money or something, because the subject came up that Mr. Nesbitt had a bank card. And we went to Crestar Bank.

Q From the time you got into the truck at 7-Eleven until when you headed to Crestar Bank, do you know where the gun was?

A Yes, I do.

Q Where was that?

A Mr. Atkins had it pointed at Mr. Nesbitt.

Q During that time, did he at any time put it back in his pocket?

A No, he did not.

Q During that time, at any point, did you have the gun?

A No, I did not.

Q And what happened – indicate on there, please, Mr. Jones, the Crestar Bank, if you know [122] where it is.

A It's right here (indicating on map).

THE COURT: Now, the witness is pointing to the bottom left-hand portion of Exhibit 4.

MS. ADDISON: Thank you, your Honor.

BY MS. ADDISON:

Q On the way to the bank, was there any conversation among anyone inside the truck?

A We was just talking about, like I said, the radio, and that was basically it.

Q Do you recall what the conversation about the radio was?

A That we just wanted it. We was just going to take it.

Q Who wanted it?

A Excuse me?

Q Who wanted it?

A Me and Mr. Atkins.

Q And that's who was going to take it?

A Yes, it was.

Q Did Mr. Nesbitt say anything about it?

A He said, take it, that he didn't care just as long as we didn't hurt him.

MS. ADDISON: As long as you didn't hurt him.

[123] Your Honor, at this time I'd ask that we can begin to show the previous ATM video tape.

(The witness returned to the witness stand.)

MR. ROGERS: Okay, sir.

THE COURT: All right. Turn it on.

MS. ADDISON: Your Honor, with the Court's permission, if I could stand next to the monitor Mr. Jones is seeing. They all should have the same image

THE COURT: Is the monitor on in front of the jury?

THE JURY: Yes, it is.

THE COURT: Okay. Yes, ma'am, you may.

BY MS. ADDISON:

Q That's the – just the very front end of the truck and the column, is that correct?

A Yes, it is.

MS. ADDISON: Mr. Hahn can advance that.

BY MS. ADDISON:

Q In this photograph, Mr. Jones, do you recognize this?

A Yes, I do.

Q And what does that show?

[124] A Me, Mr. Nesbitt and Mr. Atkins.

Q And is that you behind the driver's wheel?

A Yes, it is.

Q And Mr. Nesbitt?

A In the middle. Mr. Atkins on the passenger side.

Q Do you recall when this photograph was taken?

A On the 17th of August.

Q And do you know where the gun was at this time?

A Mr. Atkins had it pointing at Mr. Nesbitt.

Q Can you describe for the jury what is going on during these frames?

A I think we was just talking about his bank card or whatever he had in his wallet.

Q What, if you recall, was Mr. Nesbitt doing?

A He was taking out his bank card out of his wallet.

Q Do you recall what, if anything, Mr. Atkins was doing?

A He wasn't doing too much.

[125] Q do you recall where the gun was during the rest of this?

A Still pointed at Mr. Nesbitt.

Q At any point during this ATM withdrawal, did Mr. Atkins give you the gun?

A No, he did not.

Q At any point during this ATM withdrawal, did he put the gun away or in his pocket?

A No, he did not.

Q Was there any conversation while this withdrawal was going on?

A I think I might have said it was taking a long time or something.

Q Did Mr. Nesbitt say anything to you or to Mr. Atkins?

A No, he did not.

Q To the best of your recollection, did Mr. Atkins say anything to – either to you or to Mr. Nesbitt?

A Not that I can recall.

Q In this frame, Mr. Jones, there appears to be a hand behind Mr. Nesbitt's back. Do you know whose hand that is?

A That's mines.

Q And do you know during this time where [126] the gun was?

A Mr. Atkins still had it.

Q In this frame, there appears to be something in Mr. Nesbitt's hand. Do you recall what that is?

A Money.

Q The money he got from the ATM machine?

A Yes, it is.

Q How much was that, if you recall?

A Two hundred dollars.

Q And what, if you know, happened with that money?

A Mr. Atkins put it in his pocket.

Q Here again behind Mr. Nesbitt's back there appears to be a hand. Do you know whose hand that is?

A That's mines.

Q Where, at that time, was the gun, if you recall?

A Mr. Atkins still had it.

Q Where did he have it?

A Pointed at Mr. Nesbitt.

Q Appears to be a line or something on Mr. Atkins' head, did he have something –

A A hat.

[127] Q A hat. In this frame, there appeared to be a hand – two hands on the steering wheel. Do you know whose those are?

A They are mines.

Q Anything other than the steering wheel in them at that time?

A No, it's not.

Q And where, if you recall, was the gun at this point?

A Mr. Atkins still had it on Mr. Nesbitt.

MS. ADDISON: Your Honor, I don't know if this is in Counsel's way. If it is, we can take it away.

MR. ROGERS: I can move around, with the Court's permission. It's not necessary, your Honor.

THE COURT: That's fine.

BY MS. ADDISON:

Q When you left the bank, Mr. Jones, where did you go next?

A We went back to Sacramento.

Q Sacramento Apartments?

A Yes, ma'am.

Q Did you go into any of the apartments?

A No, we didn't. We went to the school.

[128] Q The school?

A Yes.

Q Is the school shown on that aerial map, Commonwealth's Exhibit Number 4?

A Yes, it is.

Q Would you point it out, please.

(The witness indicated on the map.)

THE COURT: The witness is pointing to a fairly large area immediately below the red outlined area, which is formally designated as Sacramento Apartments area on Exhibit 4.

BY MS. ADDISON:

Q Where did you go when you got to the school?

A We parked right in front of it.

Q In front of the school?

A Yes.

Q Did you get out of the truck?

A No, we did not.

Q Did Mr. Atkins get out of the truck?

A No, he did not.

Q Did Mr. Nesbitt get out of the truck?

A No, he did not.

Q Where, if you recall, was the gun [129] while you were there at the school?

A Still pointing at Mr. Nesbitt.

Q Was there any conversation amongst any of the three of you at the school?

A We started – still talking about the radio. Then we was talking about Mr. Nesbitt saw us when we was at the bank and we had to do something with him. And we suggest – I suggested that we just tie him up so we can get away.

Q Was Mr. Nesbitt involved in that conversation at any time?

A He was like, "Yes, yes, just tie me up as long as you just don't hurt me."

Q Did he say anything about the radio at that point?

A No, he never said no more about the radio. He just said – once he said, "You can have it," he didn't say no more about it.

Q So you talked about tying Mr. Nesbitt up, is that correct?

A Yes, we did.

Q Was there any discussion about where you were going to leave him?

A Well, we thought about somewhere in Hampton. We couldn't think of nowhere in Hampton. [130] Mr. Atkins said he knew where a place was in Yorktown.

Q Did he say anything else about where in Yorktown?

A He said near his grandfather's house.

Q Did you know where that was?

A No, I did not.

Q What happened next?

A We left the school, got on 64.

Q Interstate 64?

A Yes.

Q Going in which direction?

A Towards Williamsburg.

Q And about how long were you on Interstate 64?

A About thirty-five minutes.

Q Did anyone change position in the truck? Were you still driving?

A Yes, I was.

Q Was Mr. Nesbitt still in the middle?

A Yes, he was.

Q Was Mr. Atkins still on the passenger side?

A Yes, he was.

Q And where, if you recall, was the gun during that trip?

[131] A Mr. Atkins had it in his hand.

Q In his hand?

A Yes.

Q Was there any conversation among the three of you during that half-hour trip?

A Me and Mr. Nesbitt was talking about where he worked, did he have a wife or girlfriend, just basic conversation.

Q What did he tell you about where he worked?

A He said he worked at – he was in the Air Force and he worked at an auto parts store.

Q What, if anything, did he tell you about having a girlfriend?

A He said he had one but he wasn't married.

Q Did you tell him anything about yourself?

A I just told him I was married, and I had a wife.

Q Was Daryl Atkins part of that conversation?

A No, he was not.

Q What was he doing during that trip?

A I think he was still messing with the [132] radio, trying to get it out.

Q Did either you or Mr. Nesbitt say anything to Daryl Atkins during that trip?

A No, we did not.

Q And during that 30-minute trip, did he ever put the gun – did Mr. Atkins ever put the gun away?

A No, he didn't.

Q Did you at some point get off of Interstate 64?

A Yes, we did.

Q Do you know where that was?

A It was the Lee Hall exit.

MR. ROGERS: If it please the Court – excuse me just a second, Madam Commonwealth – in an effort to have matters proceed on in a more rapid fashion, since it's not really an issue here, we're getting to the issue of this case, at this – I have not objected, if the Court please, to leading questions and that sort of – form of examination by the Commonwealth. Since we're getting up to the gravamen of this case, I would request and object to any leading questions, and I'll make appropriate objection. But I wanted to forewarn the Commonwealth.

THE COURT: Thank you, so much, Mr. Rogers.

[133] If you will carefully word your questions in a nonleading fashion, Mrs. Addison.

MS. ADDISON: Yes, sir.

THE COURT: So we can still move along promptly.

BY MS. ADDISON:

Q And why, Mr. Jones, did you get off of the interstate at the Lee Hall exit?

A Because we was going to Yorktown.

Q Is that a route that you were familiar with?

A Yes, it is.

Q Had you ever been down that road before?

A Yes, I have.

Q And what happened next, after you got off of the interstate?

A We got off of the interstate and went down past the 7-Eleven to this curvy road, stopped the truck.

MS. ADDISON: If I might ask, with the Bailiff's help, the exhibit directly behind Mr. Jones, I believe that's Commonwealth's Exhibit Number 5.

CAPTAIN MOORE: Is this the way you want it?

[134] MS. ADDISON: Upside down.

BY MS. ADDISON:

Q Directing your attention to that exhibit, Mr. Jones, have you seen that before?

A Yes, I have.

Q And describe, if you would, what you know of that map.

A Of the map?

Q Yes, sir.

A That's where the killing was involved, where the killing was at.

Q If you would indicate on that map, that exhibit, the area that you're talking about.

(The witness indicated on the map.)

THE COURT: The witness is indicating to an area that is rectangular – square in shape, block boxed in, and the center upper portion of that boxed-in area, in a general fashion.

BY MS. ADDISON:

Q While you're still standing, Mr. Jones, there is one more exhibit that was behind your chair. I believe that's previously been marked as Commonwealth's Exhibit Number 6. Do you recognize that area?

[135] A Yes, I do.

Q And what is that?

A Where the murder occurred.

Q You're going to need to speak up. Speak up a little bit.

A I said this is where the murder occurred (indicating).

THE COURT: Pointing to an area which is immediately left to a white square area that looks to be an intersection or a junction.

BY MS. ADDISON:

Q Okay, prior to August 16th, 1996, had you ever been to that area before?

A No, I haven't.

Q You said you stopped there. Why did you stop?

A That's where Mr. Atkins told me to.

Q If you would, Mr. Jones, slowly describe what happened after you stopped at that spot.

A I stopped. Mr. Atkins got out. He directed Mr. Nesbitt out.

MR. ROGERS: Excuse me, I couldn't hear that.

THE WITNESS: He asked Mr. Nesbitt to get out.

[136] BY MS. ADDISON:

Q Where was the gun at that time, if you know?

A It was in Mr. Atkins' hand. As soon as Mr. Nesbitt stepped out of the vehicle and probably took two steps, the shooting started.

Q Where were you when the shooting started?

A Still in the truck.

Q Where in the truck?

A In the driver's side.

Q Were there any lights on anywhere?

A Inside the vehicle.

Q Were there any lights outside?

A No, it wasn't.

Q Excuse me?

A No, it wasn't.

Q And what did you do?

A As soon as the shooting started, seemed like there was some coming in the truck. I had rolled down the window. I tried to get out, and rolled down the window and jumped out.

Q How did you jump out of the truck?

A On my hands and knees.

Q Where, when you jumped out of the [137] truck, was Mr. Nesbitt, before you jumped out?

A He was on the passenger side.

Q Was he inside or outside of the truck?

A He was outside the truck.

Q Do you know how far outside he was?

A Like I say, he took about two steps.

Q And Mr. Atkins, at that point, was he inside or outside of the truck?

A He was outside the truck.

Q You said you couldn't get the door open, is that correct?

A Yes.

MR. ROGERS: If the Court please, –

THE COURT: Sustained. Rephrase the question.

BY MS. ADDISON:

Q Restating what you had already said, you previously said you could not get the door open. How did you get out of the truck?

A I rolled down the window and jumped out of the truck.

Q Which side of the truck did you get out?

A The driver's side.

Q You said you landed on your hands and [138] knees, is that correct?

A Yes.

MR. ROGERS: Objection, if the Court please.

MS. ADDISON: Your Honor, I'm simply clarifying his previous testimony. It is difficult to hear him.

MR. ROGERS: He said he jumped out the window. And then the Commonwealth provided the answer by way of a leading question: And you landed on your hands and knees.

THE COURT: Ms. Addison, I'm going to sustain the objection. You may ask the question – if the jurors are having trouble hearing, just raise your hands and I'll ask him to repeat the answer to the question.

BY MS. ADDISON:

Q If you recall, Mr. Jones, how did you land outside the truck?

A I landed on my hands and knees.

Q And what did you do next?

A Came around the truck. Me and Mr. Atkins started fighting over the gun. He got shot in the leg, he started saying, "Ow, ow, ow, why you shoot me?" I picked up the gun, put it behind –

THE COURT: Hold on a minute. The [139] jury is having trouble understanding. Back up, please, to what happened when you started struggling with the gun and

you shot him in the leg. From there, or he was shot in the leg. What was said?

THE WITNESS: I said I picked up me, and I came around the truck from the driver's side, came around from behind the truck. Me and Mr. Atkins started tussling with the gun. He got shot in the leg with the gun.

BY MS. ADDISON: –

Q Do you recall, Mr. Jones, how many gunshots you heard before you got out of the truck?

A About one or two.

Q Did you hear any more after that?

A When I was coming around, some more.

Q Do you recall how many?

A About two or three, something like that.

Q Couldn't you see Mr. Atkins when you came around the truck?

A Yes, I could.

Q And where was he?

A By this time the shooting had stopped. So he was probably midway of the truck right here, somewhere around (indicating). Somewhere on the driver's [140] side.

MS. ADDISON: Your Honor, for the record, I would state that Mr. "Atkins" is indicating on the previous photograph of the truck, I believe that's Commonwealth's Exhibit Number Two.

THE COURT: The Court couldn't see where he was indicating, so – I couldn't see where he was indicating.

MS. ADDISON: I would ask, with the Court's permission, that he can mark –

THE COURT: That's fine.

BY MS. ADDISON:

Q On which side?

A On the passenger side.

THE COURT: Would you mark it with an X?

(The witness marked the photograph.)

THE COURT: Is that visible? I can't see.

(The photograph was exhibited to the Court by the witness.)

THE COURT: All right. It's visible.

BY MS. ADDISON:

Q Other than the shots that you heard as [141] you were coming around the truck, did you hear anything else?

A "Ow, ow, why you shoot me? Why you shoot me, why you start shooting me?"

Q Could you tell who was saying that?

A Mr. Nesbitt was saying that.

Q How, if you recall, was Mr. Nesbitt's position after you came around the back of the truck?

A He was laying in a fetal position.

Q And where, in relation to Mr. Nesbitt, was Daryl Atkins at that time, if you recall?

A He was on the side of him when I was coming around.

Q Do you know about how far away?

A About two or three feet.

Q So we know that we're talking about the same scale, could you point to something in the Courtroom that you think is about the same distance?

A From me to the jury box.

Q The railing?

A Yes, it is.

MS. ADDISON: I'm not sure if the Court is as familiar with the measurements in this new Courtroom as in the old –

THE COURT: From where you are sitting [142] to the edge of the railing on the jury box?

THE WITNESS: Yes, it is.

THE COURT: The Court would estimate that to be five feet. Is that a fair estimate?

MR. SAUNDERS: Yes, sir, I think it is, your Honor.

BY MS. ADDISON:

Q And what, again, did you do when you came around the truck?

A I was trying to grab for the gun, but I got Mr. Nesbitt's – Mr. Atkins' hand, so we started tussling for the gun.

Q Can you describe how you tussled with him, what you were doing, what he was doing?

A Yes, I can. We was just – my hand was in his and we was just tussling over the gun.

Q How – how were you positioned, if you recall?

A I was in front of him. We was face-to-face tussling over it.

Q And where was the gun?

A It was in Mr. Atkins' hand.

Q And where were your hands?

A Mines was over his.

Q And what happened when you grabbed [143] him?

A He just went off and he said, "Ow, ow," and he dropped the gun.

Q And what did you do?

A I picked it up.

Q Until that moment when you picked that gun up, had you held onto it at any other point?

A No, I had not.

Q What did you do next?

A I put it in behind the driver's seat.

Q The gun?

A Yes.

Q And what happened next?

A Then I climbed in the same way I got out.

Q How was that?

A From the window of the driver's side.

Q Why did you do that?

A Why I do it, to get back in to drive off.

Q And did you, in fact, drive off?

A Yes, I did.

Q Who was in the truck with you as you drove off?

A Mr. Atkins.

[144] Q And where was Mr. Nesbitt?

A He was still laying on the ground.

MS. ADDISON: Your Honor, I would ask that you show Mr. Jones Commonwealth's Exhibit Number 13.

(A photograph was exhibited to Defense Counsel and then to the witness.)

MS. ADDISON:

Q Do you recognize that photograph, Mr. Jones?

A It's Mr. Nesbitt.

Q And what's his condition?

A Looks like he's dead.

Q Does that look the same or different than the way he appeared when you and Daryl Atkins drove away from him?

A Looks the same.

Q Did you ever touch him before you drove away from there?

A No, I did not.

Q What did you do next?

A I had to drive Mr. Atkins to Riverside Hospital.

Q Do you recall the route that you took to Riverside Hospital?

[145] A I think it was 64.

Q Did you and Mr. Atkins have any conversation from Crafford Road until you got to Riverside Hospital?

MR. ROGERS: Objection, if the Court please. That name of a road has not come up in this case involving this witness.

BY MS. ADDISON:

Q Until you got to the spot that you indicated –

THE COURT: Sustain the objection.

BY MS. ADDISON:

Q When you left the spot that you indicated on the aerial map where Mr. Nesbitt's body was until you got to Riverside Hospital, did you and Daryl Atkins have any conversation?

A We was cursing at each other. And he was saying, why did I shoot him. And I asked him why did he shoot Mr. Nesbitt.

Q Where, if you recall, was Daryl Atkins sitting in the truck?

A On the passenger side.

Q And what, if anything, was he doing?

A I can't recall.

Q What happened when you arrived at the [146] hospital?

A He started to get out. Before he could leave, I asked him for some money.

Q Do you know where at the hospital you were?

A Yes.

Q Where was that?

A At the emergency room.

Q Do you recall how close to the emergency room door you stopped?

A It was in the drive-through at the emergency room.

Q And when you asked Daryl Atkins for money, what did he do or say?

A He just gave me some money, closed the door, and hopped off.

Q Where was the gun at that point, Mr. Jones?

A It was still behind the driver's seat.

Q Did you and Daryl Atkins ever discuss what you were going to do or where you were going to go?

A No, we did not.

Q After that time, when was the next time that you talked to Daryl Atkins?

A I haven't since – we haven't talked.

[147] Q Do you recall what time it was when you dropped him off at Riverside Hospital emergency room?

A About 1:20.

Q And where did you go when you left?

A I went to King James Motel.

Q Where is that?

A It's in Newport News.

Q Why did you go there?

A To get a room.

Q How did you get there from the hospital?

A Drove Mr. Nesbitt's truck.

Q And what, if anything, happened when you got to the King James Motel?

A I asked this lady to get me this room. She got me a room. I stayed there.

Q What happened with the truck?

A I parked it.

Q Where?

A In the King James.

Q What, if anything, did you do with the gun?

A I didn't do nothing with it. It was still in the truck.

Q You didn't take it with you?

[148] A No, I didn't.

Q Did you tell anyone where it was?

A No, I did not.

Q Was the radio that you and Daryl Atkins discussed in the truck or not when you parked it at the King James?

A It was still in the truck.

Q Did you tell anyone it was there?

A No, I did not.

Q Did you have keys to the truck?

A No, I left them in the truck.

Q And you didn't tell anyone that you left the keys in there?

A No, I did not.

Q Did you ever go back and get in Eric Nesbitt's truck again?

A No, I did not.

Q How long did you stay at the King James Motel?

A Until Sunday. Then I went to the Thrift Inn.

Q Where is that?

A Still on Jefferson, in Newport News.

THE COURT: Repeat the answer. Where did you go after you left the King James?

[149] THE WITNESS: To the Thrift Inn Motel.

BY MS. ADDISON:

Q Why did you go there?

A I wanted to get away from the truck.

Q How long did you stay at the Thrift Inn?

A A day.

Q And where did you go from there?

A Back to the King James.

Q Do you know whether or not the truck was still there when you returned to the King James?

A I'm not sure. I think it was gone.

Q Did you go and check?

A No, I did not.

Q And throughout those couple of days, did you talk with anyone about what had happened?

A No, I did not.

Q Did you meet anyone else while you were staying at those places?

A Yes, I did. I met this guy named Red and his girlfriend.

Q But you never talked to them about what had happened?

A No, I did not.

Q Did you make any attempt to get ahold [150] of Daryl Atkins?

A Yes, I did.

Q When was that, if you recall?

A It was at the King James. I called him on the pay phone, but he wasn't home.

Q Do you know what day that was?

A No, I do not.

Q And what happened next?

A Then I just went to the Budget Inn, that's a motel, and then went back to the King James. And that's where the FBI or the SWAT team got me at.

Q You were arrested?

A Yes, I was.

Q You've been in jail ever since then, is that correct?

A Yes, I have.

Q During those several days when you were going from the various motels, did you do anything to change your appearance?

A Yes, I did.

Q What was that?

A I cut all my hair off.

Q Why was that?

A To change my appearance.

Q Mr. Jones, have you ever been involved [151] in anything like that before?

A No, I have not.

Q And up until the point when you pick it up off the ground, did you ever have a gun in your hand?

A No, I did not.

Q Who, if you know, shot Eric Nesbitt?

A Mr. Atkins.

MS. ADDISON: Thank you. I have no further questions.

THE COURT: Mr. Rogers, you may cross-examine.

MR. ROGERS: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. ROGERS:

Q Mr. Jones, how much money did you have when you left Riverside Hospital that night?

A Seventy dollars.

Q Seventy dollars?

A Yeah.

Q Okay. So you knew two hundred dollars had come out the ATM, is that right?

A Yes, I did.

[152] Q And there had been some other money from Mr. Nesbitt before, is that right?

A Yes, it was.

Q Okay. You hadn't stopped to make any purchases after that money was taken from Mr. Nesbitt, had you?

A No, I didn't.

Q Okay. And so when you left the hospital, having dropped off Mr. Atkins that night, you got seventy dollars?

A Yes, I did.

Q Okay. Then from there you went down to the King James Motel?

A Yes, I did.

Q Okay. How much did it cost you for the room that night?

A I can't recall.

Q Can't recall. How many nights were you there?

A Two nights.

Q Two nights. So after two nights it got on your conscience, is that right, and so you decided you would change locations, and that's when you went down to the Thrift Inn?

A No.

[153] Q You didn't?

A I said I stayed there one night.

Q One night?

A Then I went to the Thrift Inn, then came back to the King James.

Q Okay. So you don't know how much it was for the King James for one night?

A No, I do not.

Q How much was it at the Thrift Inn for one night?

A I can't recall.

Q How much was it when you returned to the King James the next night, still can't recall?

A I didn't pay for it.

Q You didn't pay for it, okay.

A No, I did not.

Q How about at the Budget Inn Motel?

A I didn't pay for that neither.

Q You didn't pay for that. So did you come up with friends who were kind enough to pay your hotel bills for four or five days, Mr. Jones?

A Yes, I did.

Q You did. That's nice. Who were the friends that paid your way at the King James and these other motels, sir?

[154] A This guy named Red.

Q Red. What's Red's last name?

A I can't recall.

Q What's his real name? Is his real name Red or is that his nickname?

A I think that was his nickname.

Q Think it's his nickname, you're not sure?

A Yes, I am.

Q You are sure?

A That's his nickname.

Q That's his nickname. How long had you known Red?

A Couple of days.

Q Couple of days. So when did you meet him?

A At the King James.

Q At the King James a couple days before this night of the ATM and the robbery and the murder and all that?

A No.

Q Oh, it wasn't when you met him then? When did you meet him?

A That Sunday.

Q That Sunday. The Sunday before this [155] happened or the Sunday after this happened?

A The Sunday after this happened.

Q The Sunday after this happened. Okay my question is, what night did this robbery take place?

A On a Saturday.

Q On Saturday. Okay.

A Morning.

Q Saturday morning. And you didn't meet Red, your good friend, until the next day, is that right?

A Sunday.

Q Sunday, the next day, is that right?

A Yes.

Q So he couldn't have paid your motel room on Saturday night since you didn't even meet him until the next day, isn't that true?

A I just said Sunday.

Q Let me ask you this, Mr. Jones. When you check into a motel, do they let you spend the night before you pay for your room?

A First of all, I said the lady bought the room. I gave her the money to buy the room.

Q How much money – excuse me. How much money did you give the lady? Now, the lady is not Red, that right?

A She's not.

[156] Q She's not the person known as Red?

A She's not.

Q How much money did you give the lady to get your room at the King James for Saturday night?

A I think thirty dollars. I can't recall, like I said.

Q You think thirty dollars. Okay. Did she go on with you when you changed from the King James over to the Thrift?

A No, she did not.

Q Did not. Okay. Did she stay at the room with you that night?

A No, she did not.

Q Did not. Had you known her before that night?

A No, I did not.

Q Okay. Do you know her name?

A I think it's Jackie or something.

Q Jackie or something. But you didn't know her before that night?

A No, I did not.

Q Could you explain how you arranged with this person you did not know, whose name you think is Jackie, "Would you please, ma'am," who I've never met, "get me a motel room tonight?" How did that happen?

[157] A She was on the balcony. After I parked the truck, she was on the balcony and I asked her to get me a room.

Q You asked her – she was on the balcony and you asked her to get you a room?

A Yes, sir.

Q Okay. Did she became [sic] your good friend?

A No, she did not.

Q You didn't see her any more after that?

A No, I did not.

Q And then you had a new, good friend the next night who was Red, is that right?

A Yes.

Q Okay. Did Red help you get the room at the Thrift Inn?

A He bought it.

Q He bought the room?

A Yes, he did.

Q Okay. Did he stay there at the room?

A Yes, he did.

Q Okay. Who else – you and Red and who else stayed at the room at the Thrift Inn that night?

A His girlfriend.

[158] Q His girlfriend. Do you know who she is?

A No, I do not.

Q Do not. Okay. And he paid for the room?

A Yes, he did.

Q Did you sort of help him on the cost of the room?

A Sort of.

Q A little bit. How much did you give Red?

A About ten dollars or something.

Q Ten dollars. Okay. So after the night at the Thrift Inn with Red, where you helped him with a little bit of money, about ten dollars, you then went back to the King James?

A Yes, I did.

Q How did you get your room then, Mr. Jones?

A Like I said, Red paid for it.

Q So Red – now Red has paid for the Thrift Inn, you're now going back to the King James, is that right?

A That's right.

Q Red paid for that, too?

[159] A Yes, he did.

Q So he was a real good friend?

A Yes, he was.

Q Okay. Did his girlfriend go with you – Red and you back to the motel?

A Yes, she did.

Q Okay. Did you help him with anything towards the room on that third night back at – your second time back at the King James?

A Yes, I did.

Q How much did you help him with?

A I just bought the food from McDonald's.

Q Bought the food. How much did it cost you for the food at McDonald's?

A I can't recall.

Q Okay. After that, you then went where?

A After that, we went – we was at the King James, we went to the Budget after that.

Q To the Budget. Okay. Did Red go, too?

A Yes, he did.

Q Girlfriend go, too?

A Yes, she did.

[160] Q Okay. Who paid for the room?

A Red did.

Q Okay. Did you help him out at that time?

A No, I did not.

Q You did not. Okay. And so after going off to the Budget, then you go back to the King James the third time, is that right?

A Yes, I did.

Q Did Red go with you?

A Yes, he did.

Q Did the girlfriend go with y'all?

A Yes.

Q Who paid for the room then?

A He did.

Q He did. Did you contribute to the room?

A No, I did not.

Q Did you contribute anything else by way of money to Red or his girlfriend, or you spend any money yourself from the time of Saturday up until your third time back at the King James, where you were arrested by SWAT?

A Well, I went back home to my father's house and got some money.

[161] Q Got some money from your father's house?

A Yes, I did.

Q Okay.

A From my father.

Q From your father. Okay. Did I understand from your earlier testimony, Mr. Jones, that you did not know that a robbery was going to be going down at the 7-Eleven when you and Mr. Atkins went down there that night?

A That's true.

Q You did not know?

A No, I did not.

Q Okay. You testified that he had panhandled a couple of people and gotten money from maybe one or two, is that right?

A Yes, he did.

Q Had you walked over to those people to see what was going on?

A No, I did not.

Q Okay. But when he walked over to the side of Mr. Nesbitt's truck, that's when you came over, is that right?

A Yes, I did.

Q Okay. Did you think a robbery was [162] going to go down then?

A No, I did not.

Q Okay. And he told you to get in the truck?

A Yes, he did.

Q And you did get in the truck on the driver's side, is that right?

A I did.

Q And you drove?

A I did.

Q And you drove back into the neighborhood, is that right?

A That's true.

Q What were you – where were you driving back into the neighborhood, for what reason?

A Mr. Atkins, when we went off, he was trying to get the money from him.

Q Trying to get the money from him?

A Uh-huh.

Q Okay. Did he do that?

A Yes, he did.

Q Okay. And then you sideswiped a parked car, is that right?

A A parked vehicle, I don't know what it was.

[163] Q A parked vehicle. Excuse me. You don't even know whether it was a car, truck, or what?

A No.

Q Okay. Then you went over to the school, is that what you testified?

A No, I did not.

Q After you sideswiped a car?

A No, I didn't.

Q Where did you go?

A After I sideswiped the car, we went to the bank.

Q To the bank. Okay. Now, was the – was the driver's window open or closed when you went to the bank?

A It was open.

Q Open. Okay. So it was rolled down?

A When we got there.

Q Okay. When you got there. Was it open before that time?

A I can't recall.

Q Okay. Do you remember rolling down the window of the truck?

A When we got to the bank?

Q At any time?

A Yes.

[164] Q When was that?

A When I was trying to get out when Mr. Atkins was shooting Mr. Nesbitt.

Q Okay. So you're saying that the window was up at that point?

A Yes.

Q It was. Okay. But the window was down when you got to the Crestar ATM, is that right?

A I think I rolled it down.

Q You think you rolled it down. Okay. Where was the ATM card when y'all got to Crestar?

A It was in Mr. Nesbitt's wallet.

Q And who had his wallet?

A He did.

Q He did. Okay. Who took the ATM card out of the wallet?

A He did.

Q Okay. And who used the machine, the ATM machine to get the money out?

A He did.

Q Okay. Leaned across you, is that right?

A Excuse me?

Q Did he lean across you to do that?

A Yes, he did.

[165] Q Okay. You knew what was going on at that point, didn't you?

A Yes, I did.

Q You knew that he'd been robbed and you'd been a part of it?

A Yes, I did.

Q And you knew that Daryl Atkins had been part of that?

A Yes, I did.

Q Did you understand that an abduction had taken place by that time?

A No, I did not.

Q Did not. You learned that later?

A Yes, I did.

Q Okay. Now, you testified, Mr. Jones, that you had lived in Hampton and known Mr. Atkins for just a couple of months, is that right?

A Yes, sir.

Q Where had you lived before that?

A In Gloucester.

Q In Gloucester. Okay. How long had you lived in Gloucester?

A About thirteen, fourteen years.

Q Thirteen, fourteen years. Okay. During the time of that thirteen or fourteen years, [166] Mr. Jones, that you were living in Gloucester, during a part of that time, did you have a driver's license?

A Yes, I did.

Q Did you drive across the Coleman Bridge and up Route 17 to get from Gloucester over to York County?

A Yes, I did.

Q Okay. And I believe you said that the road that you turned off of, that dark, curvy road, that you had driven before, isn't that right?

A No, I did not.

Q You did not?

A No, I did not.

Q You had never driven that road before?

A No, I haven't.

Q Had you driven up Route 17?

A Yes, I have.

Q Okay. And you knew where Riverside Hospital was, is that right?

A Yes, I did.

Q Okay. What street is that off of?

A Can't recall.

Q Can't recall?

A No, I can't.

Q How do you get there from where you [167] were?

A From Jefferson.

Q From Jefferson Avenue?

A We took 64 to Jefferson and got off.

Q Took 64 to Jefferson –

A Got off at Newport News.

Q Got off at Jefferson, Newport News, and then went down to where?

A Went across – I can't recall. I know how to get there.

Q You know how to get there?

A Yes, I do.

Q Okay. Because you didn't need directions to get there, did you?

A No, I didn't.

Q No, you knew how to drive from that curvy road all the way to Riverside Hospital without any directions, didn't you?

A I knew how to get back out of the curvy road.

Q Mr. Jones, you've said that you had seen these exhibits before?

A Yes.

Q Is that right? The one that's in front – if the Court please, –

[168] MS. ADDISON: Your Honor, if we might, I'd ask if I can move these monitors out of the way so I can sit.

THE COURT: If you're not going to use them.

MR. ROGERS: No, I'm not. No, I'm not.

THE COURT: I didn't know whether you wanted to go back over the exhibit.

MR. ROGERS: No, I don't need to do that on the ATM.

THE COURT: If you will take time out just a second, we'll get them to move. How long – just roll them over in the corner. It won't take long.

MS. ADDISON: They are all attached, but –

THE COURT: May have to unplug them, probably.

MR. HAHN: They have to be moved all together.

THE COURT: Okay. You didn't unmike yourself, did you, Mr. Hahn?

MR. HAHN: No, sir, I didn't have enough intelligence to figure out how to do that.

MS. ADDISON: I apologize for doing [169] this right in the middle of Mr. Rogers' cross-examination I just didn't want to stand during the entire thing. Thank you.

MR. ROGERS: Yes, ma'am.

THE COURT: Thank you, sir.

MR. ROGERS: Ms. Commonwealth, do you know the number of the purple aerial map?

MS. ADDISON: The purple map is Number 6. The smaller one is Number 5.

MR. ROGERS: Okay. Thank you, very much.

BY MR. ROGERS:

Q Okay. Mr. Jones, as to the purple map there on the easel that's Commonwealth Exhibit Number 6, you have seen that before, is that correct?

A Yes, I have.

Q And where did you see that, sir?

A In the Courtroom.

Q In the Courtroom?

A Yes.

Q Had you seen that before today?

A Yes, I have.

Q And where was that?

A In the Courtroom.

Q In the Courtroom. Okay. And what [170] proceeding in the Courtroom?

A Trying to get me prepared for this.

Q Okay. Okay. How long ago was that?

A Last time was last Thursday.

Q Last Thursday. How about before that?

A The 28th.

Q The 28th of January?

A Yeah.

Q How many – was that in this Courtroom?

A Yes, it was.

Q Okay. How many times have you been in this Courtroom preparing for your testimony today?

A Two.

Q Two times? Okay. As to Commonwealth Exhibit Number 6, sir, what is that? Do you know the names of that location?

A Are you talking about this (indicating)?

Q Yes, sir, the purple one right there in front, Commonwealth Exhibit Number 6.

A Do I know the names?

Q Uh-huh.

A I know them now.

Q Know them since when?

[171] A Since this case has been going on.

Q Since you've been prepared for this case?

A If that's what you want to call it.

Q Okay. Well, I just want you to tell the truth, Mr. Jones. So you have – you have known the name of that since you've been prepared for this case, right?

A Yes.

Q And what is the name of that, sir?

A It's Crafford Road.

Q Crafford Road. Would you stand up with your pointer and point where Crafford Road is on Commonwealth Exhibit Number 6, sir?

(The witness indicated on the map.)

BY MR. ROGERS:

Q Okay. And where there's that little Y in the road, what is the name of that road, that short one that goes off to that square thing, do you know what that's called?

A No, I do not.

Q You do not?

A No.

Q You weren't – you weren't told that?

A No, I wasn't.

[172] Q Okay. You can have a seat. Thank you, Mr. Jones.

A You're welcome.

THE COURT: The witness pointed to an area middle left of Exhibit Number 6, which is a white area on the diagram.

BY MR. ROGERS:

Q But you were told the name that that long one that you pointed out just now on 6, that the name of that road was Crafford Road, is that right?

A Yes, it was.

Q Who told you that, sir?

A The Commonwealth Attorney.

MR. ROGERS: The Commonwealth Attorney. Okay.

Mr. Bailiff, could you put that down, please, sir?

BY MR. ROGERS:

Q Now, have you likewise seen this exhibit?

A Yes, I have.

Q Who showed that to you?

A The Commonwealth.

Q Okay. You know the name of that section that's in the – that's Commonwealth Exhibit [173] Number 5? Yeah. Do you know the name of that road that's in that rectangle that's bordered in black down at the bottom?

A I believe that's Crafford Road.

Q Crafford Road. Okay. And when you were going to what you now know as Crafford Road, you said that you came off of what to get onto Crafford Road?

A 64.

Q 64. Do you see that on there?

A No, I do not.

Q Okay. Which direction, if you know, is Route 64?

A It's not on the board.

Q It's not on the board. Okay. Do you know the names of any of the other streets that are shown on that exhibit?

A Yes, I do.

Q What's that?

A I see 17.

Q 17. Where is that, if you would point, Mr. Jones?

(The witness indicated on the map.)

BY MR. ROGERS:

Q Okay. Is it the one that goes up and [174] down or the one that goes left and right?

A Going up and down.

MR. ROGERS: One that goes up and down.

If the Court please, for the record, the witness is pointing out on the right-hand side of that Commonwealth's exhibit a long roadway that goes almost from the top in a bow shape almost down to the bottom.

BY MR. ROGERS:

Q Now, Mr. Jones, you talked not only with the Commonwealth in this case, but you also talked with some investigators in York County, is that right?

A Just one.

Q Just one. And what was his name?

A Detective Lyons.

Q Okay. And you recall telling him that when you came off of the interstate you went down by the old York jail?

A No, I did not.

Q Does the name Krinick mean anything to you, sir, a lady by the name of Krinick?

A Yes, it do.

Q Did you likewise speak to her while you – while Mr. Lyons was present?

A Yes, I did.

[175] Q Do you recall that being August 5th - 6th of 1997?

A I don't know the exact date.

Q Don't know the exact date. Let me ask you this, Mr. Jones, had you spoken to the police or the Commonwealth's Attorney's Office, or any representative that office, before you spoke to Detective Lyons on that occasion, last year in 1997?

A No.

Q Okay. So for this – all this robbery and shooting and everything else went down in August of 1996, is that right?

A Yes, it did.

Q And you did not say anything to the police or representatives of the Commonwealth Attorney's office until a year later, is that right?

A That's correct.

Q And at the time when you spoke to Investigator Lyons, was anyone else present?

A My lawyers.

Q Your lawyers. Okay. How many did have?

A One that showed up.

Q One showed up. Okay. And anybody else there?

[176] A Ms. Addison.

Q Okay. Ms. Addison. Anybody else from the Commonwealth Attorney's Office?

A I can't recall.

Q Do you remember a Miss Krinick?

A Yes.

Q Okay. Was she there, to your recollection?

A I believe.

Q Okay. Do you remember –

MR. ROGERS: For reference, Madam Commonwealth, page twenty-five of the transcript.

BY MR. ROGERS:

Q Do you remember a question from – it says, Krinick: Okay. Did he say anything about you were going, it was a place he knew, had been there before, anything like that?

Jones: Your answer: Hmm, well, first, initially – initially Yorktown. He said his grandfather lived out there or something, something like that is what he said.

Do you remember that?

A Yes.

Q Okay. And up a little bit from that, do you remember on how you got there? It says, Krinick: [177] All right. When you got off the exit, where'd you go? And then it shows, Jones: I know we went past the 7-Eleven. Might have been a Little Sue, I don't – we passed there, went past the school, turned at a light, turned at – uh – just before you go into uh – Gloucester, uh – it was in Yorktown, right around old jail.

Do you remember that?

A No.

Q You don't remember that?

A No, I don't.

Q Okay. So do you remember getting down to Yorktown? Did you know where the jail was in Yorktown?

A Yes, I did.

Q Okay. Did you go down to the jail at Yorktown that night?

A No, we did not.

Q Now, Mr. Jones, you have admitted that you – or stated, excuse me, that you did not make a statement to the police or to the Commonwealth Attorney until August of 1997, which was a year after the event, is that right?

A Uh-huh.

Q Do you recall being asked if you had told anybody else about this, such as your mother?

[178] A No, I did not tell her.

Q Okay. Do you remember being asked about it?

A I can't recall.

Q Okay. But you said you did not tell your mother, is that right?

A That's right.

Q You didn't tell your mother anything about this, is that true?

A That is correct.

Q And you likewise didn't tell – you have a wife, is that correct?

A Yes, I do.

Q And you didn't tell your wife, isn't that true?

A That is true.

Q And what I mean by that, Mr. Jones, is that you did not tell either your wife or your mother in over a year after this thing went down that you did not shoot Eric Nesbitt, did you?

A I didn't tell them nothing about the case.

Q Didn't tell them nothing.

Back at the scene, where the shooting happened, at the time when you jumped out of the driver's [179] window, did you try to get the door open?

A Yes, I did.

Q Could you get it open?

A No, I could not.

Q So you went out the window?

A That is correct.

Q Was that headfirst or feetfirst?

A Head, hands.

Q Head, hands first. And I believe you testified that you landed on your hands and knees?

A That's correct.

Q Was that a gravel road?

A Yes, it was.

Q Okay. Did you scrape yourself up at all by jumping out this window headfirst and landing on your hands and knees?

A I could have. I don't know.

Q You don't know?

A No, I was hysterical.

Q You were hysterical?

A Yes, I was.

Q Okay. And then you said you ran around the back of the pickup truck, is that right?

A That's right.

Q And your purpose was what?

[180] A To get the gun away from Mr. Atkins.

Q Okay. Why did you want to do that?

A Because he was shooting the gun, that's why.

Q He was shooting the gun. Okay. When you got around, the gun had been shot, is that right, a lot of times?

A Yes.

Q Okay. And you said that when you got around the truck, where was Mr. Nesbitt?

A He was on the ground.

Q On the ground. And where was Mr. Atkins?

A He was about five – five feet away from him.

Q Five feet away. Okay. And you then grabbed him?

A Yes, I did.

Q And describe again how he was standing when you grabbed him.

A He was standing – he was standing about rear of the truck, by the tires.

Q He was standing at the rear of the truck by the tires?

A Yes, by the tires.

[181] Q On the passenger side?

A Yes, sir.

Q How was his – what positions were his hands in?

A Still pointing at Mr. Nesbitt.

Q And he had – he had the gun in his hand?

A Yes, he did.

Q How could you see it?

A I could see him because of the truck door was still open.

Q But he's at the back wheel, is that right?

A Yes, he is.

Q And the only light was up in the cab?

A Yes, sir.

Q And you saw him with the gun in his hand?

A Yes, sir.

Q Which hand?

A I can't recall which hand.

Q You remember when you talked to the Commonwealth and Inspector Lyons – or Investigator Lyons back in August of '97 what hands, didn't you, and told them it was in his left hand? Do you remember that?

[182] A Probably did.

Q Probably did. Let me ask you a silly question, Mr. Jones. Is your memory better now or was your memory better a year – or back in August of '97?

A I don't know.

Q You don't know?

A I've got a bad memory.

Q Got a bad memory. Okay. So you could have said – you wouldn't deny that you said that Mr. Atkins had the gun in his left hand?

A I'm not going to deny it.

Q Okay. And you say it was pointing at Mr. Nesbitt?

A Yes, sir.

Q And Mr. Nesbitt was on the ground?

A Yes, sir.

Q So when you came up and he's holding it in his left hand, pointing down at Mr. Nesbitt, did you come up behind him?

A I came around.

Q Okay. You came around the truck and then around Mr. Atkins, so you got in front of him?

A Yes, I did.

Q And the gun is now pointing at you?

A I know.

[183] Q Is that right?

A No, it was still pointing at the ground then, we were still tussling over it, and it went up. His hands went up in the air, then went back down, and that's when he dropped it.

Q Okay. His hands went up in the air, now y'all are tussling?

A Uh-huh.

Q Y'all are face-to-face, is that what you said?

A That's what I said.

Q And then the hands came down?

A Yes, sir.

Q And he was standing up?

A Yes, sir.

Q And you were standing up?

A Yes, sir.

Q And y'all were face-to-face?

A Yes, sir.

Q And the gun goes off?

A Yes, sir.

Q And then he says, "Ow"?

A Ow. He's yelling. I didn't say he just said ow.

Q Yelling. And then got mad, cursing [184] and everything?

A Yes, sir.

Q Okay. And you heard how many shots at that point?

A At that point?

Q Yeah.

A At least seven at that point.

Q No, I don't mean by that point. I mean, when you were tussling with him, how many shots did you hear?

A One.

Q One. Okay. You heard one shot and the gun – he's got it in his left hand and now it's pointed down, is that right?

A Uh-huh.

Q And you heard one gunshot go off?

A Yes.

Q Was that – that was the last shot you heard, is that right?

A That is.

Q Okay. Okay. And then, what, you got in the truck?

A I went back around the truck and got in.

Q And he got back in the truck?

[185] A Yes, sir.

Q And was sitting on the passenger side?

A Yes, sir.

Q And did you see that he was bleeding or that he had been shot?

A I couldn't see it.

Q You couldn't see it?

A No, sir.

Q The light was on in the truck, wasn't it?

A Yes, sir. I was pulling off as soon as I got in then.

Q Mr. Jones, you testified that you jumped through the window to go around to stop Mr. Nesbitt from being killed, is that right?

A I don't recall saying that.

Q Well, let me rephrase it another way. When you jumped out of the driver's side window, as you've testified, to run around and stop the shooting and tussle with Mr. Atkins, why did you go around there?

A To stop him from killing him.

Q Right. To stop him from killing Mr. Nesbitt, right?

A That's right.

Q And then one gunshot went off that [186] wounded Nesbitt – that wounded Daryl, is that right, Atkins?

A Yes.

Q And then y'all got in the truck and left?

A Yes.

Q And you've testified, did you not, you didn't touch Mr. Nesbitt?

A Yes, I did.

Q You did testify or you did touch him?

A I did not touch him.

Q Did not touch him. Mr. Jones, did your concern just go away? In other words, you were concerned about making sure that Nesbitt was not killed, and then when the shooting stops you don't even check him, is that right?

A I wasn't going to check him because he was bleeding too bad. I wasn't going over there to see if he was dead or not.

Q Yeah, you didn't want to go do that, did you?

A No, sir.

Q And you didn't want to go around and help him, did you?

A No, I did not.

[187] Q No. Because you went around, did you not, sir, because that's where you were when you pulled the gun and started shooting him, isn't it?

A No, that's where your client is.

Q Uh-huh. You were outside of the driver's door when this tussle went on, is that right?

A The driver's door?

Q The passenger door. Excuse me. You were outside of the area of the passenger door when the shooting went on, is that right?

A That is correct.

Q And where do you say Mr. Atkins was?

A I said he was by the driver's wheel – behind the passenger – behind the truck by the wheel.

Q Behind the truck by the wheel. And that's where he was when all the shooting took place?

A I can't recall where he was.

Q You can't recall. Oh. Did you say something about some shots going around in the truck?

A Yes, I did.

Q Where was – where was Mr. Atkins then?

A I couldn't see him because of Mr. Nesbitt.

Q Where was Mr. Nesbitt at the time?

[188] A He was about five feet away from the truck.

Q Five feet away. The passenger door is open?

A Yes, it is.

Q Mr. Nesbitt is about five feet away?

A Yes.

Q And where – and you couldn't see Mr. Atkins?

A No, I could not.

Q So he wasn't behind Mr. Nesbitt, away from the truck?

A Like I say, I couldn't see him.

Q Couldn't see. But you heard bullets come in?

A Yes, I did.

Q Okay. Now, you had seen yourself on TV, is that right?

A That is correct.

Q You had seen Mr. Atkins on TV, is that right?

A That is right.

Q Uh-huh. That was the first time was about the ATM, is that right?

A Yes, sir.

[189] Q And you were also on TV talking to a reporter for the TV station?

A That's right.

Q You also saw a report on TV where Mr. Atkins was talking to a reporter of the TV station, that right?

A No, it is not.

Q It's not right? Okay. Now, Mr. Jones, you knew, did you not, that after Mr. Atkins was arrested, he made a statement to the police?

A I don't know. I didn't recall that.

Q Let me rephrase it. At any time after your arrest, did you learn that Daryl Atkins had made a statement to the police?

A Yes.

Q Yes? Is that right?

A Yes.

Q When was that?

A I can't recall, like I said.

Q You can recall that that was before you made your statement, isn't that true?

A That is true.

Q Okay. Now, also, you knew that there had been some state forensics tests made, didn't you know that, as to bullets and blood and clothes and other stuff [190] like that?

A Yes.

Q And you had seen the reports?

A No, I had not.

Q You had not. You had discussed the reports?

A No.

Q You had not?

A No.

Q Well, how did you know that there were those tests then, sir?

A Because I was in Court when the Judge said something about it.

Q Okay. So you did know before you made your statement what statement Daryl Atkins has made, is that right?

A Say again?

Q You did know that Daryl Atkins had made a statement to the police before you made your statement to the police?

A That is true.

Q And you knew in that statement that he was saying that you were the one who did the shooting, is that right?

A That is correct.

[191] MR. ROGERS: Okay. Your Honor, if I could see Commonwealth Exhibit Number 69.

THE COURT: Yes, sir. I have not marked that as an exhibit yet. It has been identified. It has not been offered into evidence yet.

MR. ROGERS: Okay.

MS. ADDISON: I don't believe that there is any objection.

MR. ROGERS: Move it be admitted then as Commonwealth Exhibit 69, your Honor.

THE COURT: All right. Without objection of the Defense, the Court will mark Commonwealth's Exhibit 69 filed and make it a part of the evidence in this case.

MS. ADDISON: Thank you, your Honor. (Commonwealth's Exhibit Number 69 was received in evidence.)

THE COURT: All right. Now you can see it.

MS. ADDISON: Thank you, your Honor.

MR. ROGERS: If you would put that over in front of Mr. Jones, I'd appreciate it, Sheriff.

THE BAILIFF: Yes, sir.

(A document handed to the witness.)

[192] BY MR. ROGERS:

Q Mr. Jones, you can read and write the English language, is that right, sir?

A Somewhat.

Q Somewhat. Okay. Well, if you would look at Commonwealth Exhibit Number 69, and stop me if I misquote anything. Memorandum of plea agreement. This memorandum of plea agreement is presented to the Circuit Court for the County of York – or County of York County and the City of Poquoson in compliance with Rule 3A:8C2 of the Rules of the Supreme Court of Virginia. Part one: The Defendant. Do you know who that refers to?

A Yes.

Q Who is that?

A Me.

Q You. Okay. Currently stands charged with murder, indictment number one.

At that time, Mr. Jones, what kind of murder were you charged with?

MS. ADDISON: Your Honor, I object. I don't know if he knows what time he's referring to.

THE COURT: Put a time frame around it.

MR. ROGERS: All righty.

BY MR. ROGERS:

[193] Q Sometime on or before September 5th, 1997, when you signed this, 1997, September 5th, did you know what you were charged with at that time, Mr. Jones?

A Yes, I did.

Q Okay. What kind of murder was that?

MS. ADDISON: Your Honor, if I might for a moment. Again we're going into an area that was covered by pretrial motions, before we have another episode of –

THE COURT: All right. It's enough time to have the jury take a rest anyway. Why don't we let them recess momentarily, so that we can take this matter up outside of your presence.

Ladies and gentlemen, so I'm going [sic] ask now that you retire to the jury room.

The case has not yet been completed. Do not begin your deliberations. The Court will advise you when it's ready for you to deliberate.

You may retire.

(The jury retired to the jury room.)

THE COURT: All right, Ms. Addison, what's the objection of the Commonwealth?

MS. ADDISON: Well, your Honor, the Court may recall several weeks ago we filed a motion in [194] limine asking the Court to limit Defense Counsel from delving into an area of the change of the charge from the original capital murder charge to murder in the first degree insofar as it was referenced as to why that change was made, other than the plea agreement alone.

I simply want to clarify that any questions about the change of that charge or when he was originally charged with capital murder and what the Commonwealth thought as far as the theory of the case, who was the trigger man, what the investigator may have thought as far as the theory of the case and who was the trigger man, has already been ruled on. He is not to go into that area.

Certainly, he can ask about the – if Mr. Jones understands the difference between the capital murder charge and what he pled to, first degree murder, as part of that plea agreement, but I simply want to make sure that there is no misunderstanding that he is not to inquire or argue about the theory of the Commonwealth's case.

MR. ROGERS: Excuse me, could the witness be removed during this discussion, your Honor?

THE COURT: Certainly.

MR. ROGERS: Okay.

THE COURT: Would you please retire [195] the witness to the appropriate quarters.

THE BAILIFF: Yes, sir.

(The witness was sequestered from the Courtroom.)

MR. ROGERS: Thank you, your Honor.

THE COURT: Thank you. We probably should have done that earlier.

This is the order. This is the motion. Could you get me the order, too? Just tag it – have you got a stickum?

Excuse me, I'm trying to get the Court record so that we can refer without having to guess as to what was done. I can look officially at the Court file, the motions that were filed and the orders that were entered. That will help us resolve these issues.

The Court, with the able help of its Clerk, has got the motion in limine tagged, which was filed by Ms. Addison, on behalf of the Commonwealth, on January 27th, 1998.

Do you all have that before you?

MR. ROGERS: No, sir, but I'm abundantly aware of the motion and the ruling of the Court and the resulting order.

THE COURT: Okay. Let me just refresh the Court's mind then.

[196] All right. Ms. Addison, was there more than one motion in limine filed?

MS. ADDISON: I don't believe so, your Honor, not that was titled that way. I believe there were motions for a pretrial ruling.

THE COURT: On the admissibility of certain evidence, which we covered Tuesday or Wednesday, or whatever it was. Is that right?

MR. ROGERS: This is separate, yes, sir.

THE COURT: All right. The motion in limine the Court has before it is the 27th of January, '98. Is that the same one?

MS. ADDISON: That's correct, your Honor. That was, I believe, the same day as the hearing, the same day the Court entered the order granting the motion.

THE COURT: Would you like to approach to make sure that I'm looking at the right motion, Mr. Rogers?

MR. ROGERS: Yes, sir.

(Counsel for both sides approached the Bench.)

MS. ADDISON: Is there an accompanying order, your Honor?

[197] THE COURT: Well, there's more right back here which have been tagged. Hold on a minute, before you leave. Pretrial motions and then –

MR. HAHN: That's a different –

MR. ROGERS: That's a different one.

MS. ADDISON: This, your Honor.

MR. ROGERS: Thank you. That's it.

MS. ADDISON: Motion in limine.

MR. ROGERS: Yeah, that's it. Right. Right.

THE COURT: Shall we go directly to the order?

(Counsel returned to counsel table.)

MR. ROGERS: Yes, sir.

THE COURT: Ms. Addison, will that cover it if we go directly to the order?

MS. ADDISON: If it will refresh the Court's memory, I'm sure Mr. Rogers and I know exactly what I'm talking about. I'm not sure that I've gotten the Court on the same page

THE COURT: That's what we're trying to do.

Accordingly, this is reading from the Court's order entered on the same date, 27 January, 1998, [198] accordingly, Counsel for the Defendant are ordered to refrain from making any inquiry into any comment upon or argument relative to any, quote, belief, close quote, or, quote, opinion, close quote, that personnel of the Commonwealth's Attorney's Office or the Sheriff's Department may or may not have formed in the course of the investigation and prosecution of this case.

MR. ROGERS: Right.

MS. ADDISON: Your Honor, I'm raising this prematurely or peremptorily in view of what happened the other day, just so that everyone remembers this order

is in place, and we don't have another question hanging out there before the jury that should not have been asked.

THE COURT: All right. I appreciate that.

MR. ROGERS: Your Honor, the question that I inquired of this witness is what he knew as to what degree of murder he was charged.

MS. ADDISON: Again, your Honor –

MR. ROGERS: I understood and accede to the Court's ruling and order that I am not to comment on any opinion or belief of any member or staff of the Commonwealth Attorney's Office nor anyone with the York County or any other police agency. And I will not do that, your Honor, I promise.

[199] THE COURT: Ms. Addison, I thought that the question that he posed was a proper one.

MS. ADDISON: It was, your Honor. I am not objecting to the question he just asked. I'm asking the Court to remind everyone of this order so that an objectionable question and possible answer is put before the jury as almost happened the other day in a similar situation.

THE COURT: All right.

MS. ADDISON: Thank you.

THE COURT: And Mr. Rogers fully and really knows and acknowledges the Court's order.

MR. ROGERS: That's right. Yes, sir.

THE COURT: All right. Well, the Court is going to take a five-minute recess now. Take five or ten minutes, so if you all will stand at rest while the Court is in recess.

(The Court recessed, after which the Court reconvened.)

(The Defendant was present with his counsel following the recess.)

THE COURT: Are you ready to proceed?

MS. ADDISON: Yes, sir.

THE COURT: Get Mr. Jones back on the [200] witness stand and get the jury back, please.

THE CLERK: Will the jury please return to the Courtroom. Will the jury return to the Courtroom.

(The witness returned to the Courtroom and resumed his seat on the witness stand.)

(The jury returned to the Courtroom and resumed their seats in the jury box.)

THE COURT: There are thirteen members in the jury box. Do you waive the poll?

MR. ROGERS: So waive, your Honor.

MS. ADDISON: Yes, sir.

BY MR. ROGERS:

Q Okay, Mr. Jones, we had a little time away from the stand, and I had forgotten to ask you a thing or two, or one thing at least, earlier.

Going back and refreshing your memory as to back in early August of 1997, you remember we talked about

your conversation with some police officers in York County about a statement that you gave, the first statement you gave the police?

A Detective Lyons.

Q Excuse me?

[201] A Detective Lyons.

Q Okay. You remember your discussion that you had with Detective Lyons, and that was the first statement that you gave the police, is that right?

A Yes, it is.

Q And that was in August of 1997?

A Yes.

Q Okay. Do you remember, sir, a question and answer that took place on page – this would be 32, Madam Commonwealth – a question and answer – let's see – Krinick, and this is after all the shooting has taken place, okay? Krinick, question: How did you get back in the truck. Jones: Through the – passenger side.

Do you remember that – making that statement?

A Yes, I do.

Q Okay. So it's your testimony – is that correct?

A No, that is not a correct statement.

Q So you made the miss – you made the statement then that you got back into the truck through the passenger side?

A I did make that statement.

Q But that's not true?

[202] A That is not true.

Q You got back in how?

A Through the driver's side.

Q Through the driver's side?

A Yes.

Q Through the what on the driver's side?

A The window.

Q The window on the driver's side. Okay.

Now, Mr. Jones, do you have Commonwealth Exhibit Number 69, is that still there, the plea bargain agreement?

A Yes, it is.

Q Okay. Let's go back up to the top of that where it says part one. Do you see that?

A Yes, I do.

Q And it says, quote, "The Defendant currently stands charged with murder, Indictment Number One." Do you see that?

A Yes, I do.

Q What degree or what level of murder were you charged with at that time?

THE COURT: That time being –

MR. ROGERS: That time being in August or September, early September, 1997.

[203] THE WITNESS: First degree.

BY MR. ROGERS:

Q First degree?

A Yes, sir.

Q How long had you had the first degree murder charge?

A I guess since this. I can't recall.

Q Well, let me ask you this, Mr. Jones. You, at one time, were charged with capital murder, is that true, sir?

A That is correct.

Q And you were charged with capital murder when you were down in the low Court, the General District Court?

A I guess so.

Q Okay. And when you were indicted in the Circuit Court, that was in York County, you were indicted for capital murder?

A That is correct.

Q And by the time of this agreement, were you still charged with capital murder?

A I can't recall.

Q Can't recall?

A Not by the time, no.

Q Not by the time. If you look over on [204] the third page of that, sir, it says – does it say down on the third page, agreed to this 5th day of September, 1997?

A Yes, it do.

Q All right. And back on page, part one, when it says stands charged with murder, Indictment Number One, it does not say whether it's capital murder or first degree or murder in the second degree, is that true?

A No, it don't.

Q Just says murder, Indictment Number One?

A That's what it says.

Q Okay. And the next line says, abduction, Indictment Number Two; robbery, Indictment Number Three; and three counts of use or display firearm in commission of a felony, Indictment Numbers Four, Five, Six, right?

A Yes.

Q So at that time you had those six charges against you?

A I still do.

Q Still do. Okay. Part two, the Commonwealth of Virginia, by and through Eileen M. Addison, Commonwealth's Attorney for York County and the City of Poquoson, and the Defendant, William Alfredic –

[205] is that spelled right?

A No, it's not.

Q Okay. Last name Jones. Is that you?

A That is.

Q Okay. With the advice and consent of his attorneys, Leslie P. Smith, Esquire, and Timothy G. Clancy,

Esquire, hereby agree as follows: And then below that it has subparagraph one: The Defendant – now, who is that referring to?

A Me.

Q Okay. – agrees to plead guilty to all six of the indictments referred to in part one of the agreement. The Defendant also agrees that the Circuit Court for York County and the City of Poquoson has jurisdiction over these charges, and if presented the Commonwealth's evidence would be sufficient to prove the Defendant's guilt to each charge beyond a reasonable doubt.

Is that what it says?

A That's what it says.

Q So what – is it your understanding that that says there was enough evidence to convict you of all six of those charges?

A Yes.

Q Okay. Subparagraph two: The [206] Defendant agrees to fully cooperate and be truthful with the Commonwealth Attorney's Office for the County of York and City of Poquoson and the investigators and other personnel of the York County Sheriff's Department and provide all information known to the Defendant relating in any fashion to the abduction, robbery and murder of Eric Michael Nesbitt on or about August 17th, 1996. Among other things, the Defendant agrees to, colon, and that finishes that page, is that right?

A Yes, it does.

Q Okay. Top of the second page, subparagraph A. This is what you agreed to do, is that right?

A Yes, sir.

Q A, testify truthfully and completely in any trial or other criminal proceedings brought against Daryl Renard Atkins.

Is that the Defendant seated here?

A Yes, it is.

Q Okay. For the criminal charges referenced in part one of this agreement and, B, be reasonably available for such pretrial conferences and interviews as the Commonwealth may deem appropriate.

Then paragraph three under that: It is further agreed and understood between the Commonwealth [207] of Virginia, the Defendant, William Alfredic Jones, and his attorneys, Leslie P. Smith, Esquire, and Timothy G. Clancy, Esquire, that if it becomes apparent for whatever reason or from whatever source that the Defendant has failed to be completely truthful and/or has failed to fully cooperate with the Commonwealth as required by this agreement, the Commonwealth shall be released from all obligations imposed upon it by the terms of this agreement. Whether the Defendant has breached any provision of this agreement shall be determined by the Court in an appropriate proceeding, at which all of the Defendant's disclosures shall be admissible. The Commonwealth shall be required to prove a breach of this agreement by a preponderance of the evidence.

Is that what that says?

A Yes, it is.

Q Let me ask you this, Mr. Jones, if you know, and you may or may not. Do you know what burden of proof there is in a criminal case?

A No, I do not know.

Q Don't know? Have you ever heard the phrase, beyond a reasonable doubt?

A Yes, I did.

Q What does that mean?

A It's beyond a reasonable doubt.

[208] Q Okay. You think that's more or less than preponderance of the evidence?

A More.

Q More. Okay.

Four: If the Defendant abides by the terms of this agreement, the Commonwealth shall not utilize any truthful information provided by the Defendant, pursuant to this agreement, against the Defendant in any other criminal proceeding in York County, Virginia, except in a prosecution for perjury or perjury-related offense. If the Defendant violates any provision of this agreement, however, it is specifically understood and agreed that the Commonwealth shall have the right to utilize all information given by the Defendant, together with any derivatives thereof, for such purposes as the Commonwealth deems advisable.

And that's the end of part two. Is that right, sir?

A Yes, it is.

Q Okay. Part three. In exchange for the Defendant's cooperation, as described above, and upon the Defendant's complete performance of the terms of this agreement, the Commonwealth agrees to: Subparagraph one, move the Court to vacate its finding of guilt on Indictments Number Two, Three, Five and Six.

[209] What was supposed to be dropped, to your understanding, Mr. Jones, if you completely perform in accord with the terms of the agreement?

A Two, three, five and six.

Q Do you know what those charges are?

A Yes, I do.

Q What are they?

A Robbery, abduction, and two firearm charges.

Q Okay. Do you know what the maximum sentences are on robbery and abduction?

A Life.

Q Life on each one, isn't it?

A Yes, it is.

Q And the firearms charges, five years apiece?

A I think so.

Q Okay. Paragraph two, subpoena an investigator, the Commonwealth agrees to, two, subpoena an investigator for the York County Sheriff's Department to testify regarding the Defendant's cooperation with the Commonwealth, pursuant to this agreement, and asks the

sentencing judge to consider that cooperation favorably imposing sentence on the Defendant.

Now, what does that statement mean to [210] you, sir?

A Excuse me?

Q What does that statement, paragraph two, that I just read, what does that mean to you?

A For the judge be a little lenient.

Q The judge be a little lenient. And somebody from the Sheriff Department going to do what?

A I don't recall.

Q Okay. That finishes part three, is that right?

A Yes, it does.

Q Okay. Part four. It is lastly agreed and understood that this agreement extends only to the charges arising from the abduction, robbery and murder of Eric Michael Nesbitt on or about August 17, 1996, as set forth in Docket Number 8230, now pending before the Circuit Court for York County and the City of Poquoson, and in no way extends to any other case against the Defendant, if any should exist. This is the only agreement between the Commonwealth of Virginia and William Alfredic Jones concerning his cooperation in this matter, and there are no other agreements, deals, bargains or understandings that modify or alter this agreement.

Part five. In accordance with the provisions of Subparagraph C-1-C of said Rule 3A:8, the [211] Commonwealth and the Defendant have agreed to jointly move

the Court to order the preparation of a presentence report by the Parole and Probation Officer of the York-Poquoson Circuit Court, and each reserves the right to argue the appropriate disposition of these cases at the sentencing hearing. All parties hereto understand and agree that the Court is not bound by and need not impose a sentence within the sentencing guidelines range but may impose any sentence allowed by law. The Defendant understands that any estimate of the probable sentencing range under the sentencing guidelines that the Defendant may have received from the Defendant's Counsel, the Commonwealth or any other source is, at most, a prediction and not a promise and is not binding on the Court. The Commonwealth makes no promise or representation regarding what sentence the Defendant will receive, and the Defendant agrees that he cannot withdraw his guilty pleas based on the actual sentence received.

Does that end that paragraph, sir?

A Yes, it do.

Q And then three, four lines in bold type, I have read and reviewed the terms of the foregoing agreement and agree to abide by its terms. I understand the consequences of my failure to do so and am doing so freely and voluntarily.

[212] What is the consequence, as you understand it, Mr. Jones, of your failure to do so?

A All the charges will be stand [sic] for.

Q All six charges, right?

A That is correct.

Q Is that your signature down on the top line right under agreed to this 5th day of September, 1997?

A Yes.

Q And whose signature below that?

A Leslie Smith.

Q Smith. Okay. And he's one of your attorneys?

A Yes, he is.

Q Did he sign this in your presence?

A Yes, he did.

Q And the last line down at the bottom, whose signature is that?

A Eileen M. Addison.

Q And was that signed by her in your presence?

A Yes, it was.

MR. ROGERS: Now, if the Court please, at this time, I would move – I don't know if it has been introduced – it has been? Okay.

[213] William A. Jones – Redirect

THE COURT: 69.

MR. ROGERS: 69. Thank you.

BY MR. ROGERS:

Q Mr. Jones, one other question. When is your sentencing scheduled in this Court?

A February 26th.

Q Of 1998?

A Yes.

Q So it comes up in a couple of weeks?

A Yes, it do.

Q Does this agreement have any effect on the truthfulness of your testimony, Mr. Jones?

A No, it do not.

Q You would testify truthfully regardless, is that right?

A That is correct.

MR. ROGERS: That's all the questions I have of this witness, your Honor.

THE COURT: Redirect?

MS. ADDISON: Thank you, your Honor.

REDIRECT EXAMINATION

BY MS. ADDISON:

Q Mr. Jones, what, if you know, is the [214] maximum penalty for first degree murder?

A Life in prison.

Q How much education have you had?

A Twelfth grade.

Q How long ago was that?

A Ninety-eight – '89, excuse me. '89.

Q Did you graduate from high school?

A Yes, I did.

Q Did anyone explain that agreement that Mr. Rogers just read to you, did anyone explain it to you?

A My lawyers.

Q Was that before or after you signed it?

A Before.

Q Did anyone tell you what to say when you testified?

A No, they did not.

Q Why are you testifying?

A One thing, just so Mr. Nesbitt's family know what really happened. And the other is because of my mother. She told me to. And my father, before he died, told me to testify.

Q When did your father die?

A August 16th, '97.

Q Do you recall when you learned about [215] Mr. Atkins' statement to police?

A No, I can't recall.

Q Do you recall whether or not it was before or after the statement that you gave to Investigator Lyons in August of 1997?

A It was before.

(The attorneys for the Commonwealth conferred.)

BY MS. ADDISON:

Q In answer to Mr. Rogers' question about whether or not you had seen an interview Daryl Atkins gave to a television reporter, did you ever see that?

A No, I did not.

Q How did you find out that Mr. Atkins had given a statement to the police?

A I believe through my lawyer.

Q Directing your attention again back to the interview you gave to Investigator Lyons in August of 1997, Mr. Rogers asked you about a statement you gave that Mr. Atkins, you thought, had the gun in his left hand?

A That is correct.

Q Do you recall him asking you that? Do you recall being asked at that time if you ever get confused knowing your left from your right?

[216] A Yes, it was asked.

Q And what was your response?

A I said yes, especially when I'm nervous.

Q Are you nervous today?

A Yes, I am.

MS. ADDISON: I would ask if I might have Commonwealth's Exhibit, I believe it's 3, the ATM, if you would set that up there.

THE COURT: The photograph, I think it's on the bottom, Sergeant. Check on the back of it. Set it up on the easel, will be fine. All right. Thank you.

BY MS. ADDISON:

Q You identified that earlier, and the people in that picture?

A Yes.

Q Does that picture show where the gun was at the time?

A Yes, it did.

Q Where is that?

A Mr. Atkins got it.

Q Can you point out on that picture where it is?

A Yes (indicating).

[217] MR. ROGERS: May I approach, your Honor?

THE COURT: Yes, you may.

Can the jury see where he pointed?

THE JURY: Yes.

THE COURT: I was blocked, I couldn't see.

Use the pointer, please.

BY MS. ADDISON:

Q Can you tell from that picture, Mr. Jones, whether Mr. Atkins has the gun in his left hand or his right hand?

A He has it in his right.

Q Does that appear to be accurate, the way you recall it?

A Yes, it do.

Q What do you recall about which hand he had the gun in after you got out of the truck and came around the back of the truck?

A Like I said, I really can't remember because I was distressed and distraught and stuff, but I recall it was in his right hand – his left hand.

Q Different from the picture, or the same?

A Like I say, I can't recall.

[218] Q You said you were distraught. Why were you distraught?

A First of the shooting and stuff and just all the noise and hollering and stuff.

Q You testified earlier that before you got out of the truck you could see Mr. Nesbitt?

A Yes, I did.

Q And where was he?

A About five feet away from the truck, from the door.

Q Do you recall how he was positioned at that time?

A His back was towards me.

Q Was he standing or down on the ground?

A He was up.

Q When you tried to get the door open, could you see what he was doing or where he was?

A No, I couldn't. I was concentrating on the door at that time.

Q And when you were going out through the window, could you see what Mr. Nesbitt or what Mr. Atkins were doing or where they were?

A No, I could not.

Q When you were still on the driver's side of the truck, before you came around the back, could [219] you see where they were or what they were doing?

A No, I could not.

Q When was the first time you could see them again?

A When I got around the truck.

Q Do you recall if their position was the same or different than when you had seen it last?

A Mr. Eric Nesbitt was on the ground. Mr. Atkins, he was –

MR. ROGERS: Your Honor, that wasn't responsive to the question. Was it the same or different position, the same or different than what it was previously, and he went off to different things, so he did not answer that question, your Honor.

THE COURT: All right. It calls for one word answer.

BY MS. ADDISON:

Q Was it the same or different from where you had seen them before you got out of the truck?

A No.

Q Was it the same or different?

A Was it different? Yes, it was.

Q How was it different?

A Mr. Nesbitt was on the ground. Mr. Atkins was over top of him like.

[220] Q In response to Mr. Rogers' question, you said that you did not tell your wife or your mother anything about this incident. Why did you not do that?

A On advice of my lawyers, do not discuss the case with anybody.

Q Did you tell anyone else?

A No, I did not.

Q When asked by Mr. Rogers if you'd seen Commonwealth's Exhibit Number 5, that map on the easel behind you, you said you had seen it two times in the Courtroom. Had you ever seen it before then?

A No, I have not.

Q If you would, directing your attention to that – to that map, if you could take the photo down.

THE COURT: That's Exhibit 5?

MS. ADDISON: Yes, sir, Commonwealth's Exhibit Number 5.

BY MS. ADDISON:

Q Mr. Jones, having been told or learned what those streets are, were you familiar with the streets before you ever saw that map?

A I knew the street by the Naval Weapons Station.

Q Where is that on there, if you know?

A I believe it's right here [221] (indicating).

THE COURT: The witness is pointing to what appears to be a dark line in the upper left-hand portion of the exhibit, running from left to right.

BY MS. ADDISON:

Q And how is it that you knew that street by the Naval Weapons Station?

A I didn't know the name, but I used to travel there from Gloucester to Williamsburg.

Q When did you do that?

A From '92 to '91, something like that.

Q In answer to Mr. Rogers' question, you said that you did not go back and check on or touch Mr. Nesbitt before you left the area where he had been shot. Why didn't you do that?

A Well, he wasn't moving or anything. thought he was dead, and I've just got this thing about touching

BY MR. ROGERS:

Q Sir, at that point you see some [224] buildings right there at Route 17 where you come out?

A Yes, sir.

Q What is that?

A I believe it's a school.

Q The school. The school?

A Yes, sir.

Q So that's the way you come out, is that right, when you go on that road from Williamsburg past the Weapons Station over to 17, and you come out right where the school is?

A Yes, sir.

Q Okay. Now, Mr. Jones, you have testified to your knowledge of what the maximum penalty is for abduction and robbery and murder in the first degree. Do you know what the maximum penalty is for capital murder?

A Yes, I do.

Q What is that?

A That's the death penalty.

Q The death penalty. Uh-huh. Mr. Jones, what is your status right now as to the death penalty?

A I don't have one, I don't think.

Q You don't have one, do you?

A No, I don't.

[225] Q That agreement that you signed with the Commonwealth took that away, didn't it?

A Somewhat.

Q Somewhat or completely?

A Well, from the State giving me the death penalty, yes.

Q Right. So the State cannot give you death penalty for the capital murder of Eric Nesbitt, can it?

A No, it cannot.

Q Because of this agreement, isn't that right?

A It is.

Q Would that affect your testimony?

A No, it would not.

MR. ROGERS: Thank you, Mr. Jones. One second.

(Defense Counsel conferred.)

MR. ROGERS: That's it, your Honor.

THE COURT: Re-redirect?

FURTHER REDIRECT EXAMINATION

BY MS. ADDISON:

Q Mr. Jones, again directing your [226] attention to that map, Commonwealth's Exhibit Number 5.

A Yes.

Q In the early morning hours of August 17th, 1996, when you went to the spot that you now know is on Crafford Road, which way did you come into that area, if you would indicate for the jury on the map?

(The witness indicated on the map.)

THE COURT: He pointed to the lower portion. Is that – is that in the other part of the map, that lower block, is that in the other part of the map as well?

MS. ADDISON: He's indicating, I believe, the dark line as the road going through there on the left-hand side.

THE COURT: Right. On the lower block. The block – the part that's blocked.

MS. ADDISON: He pointed to both, your Honor.

THE COURT: How about the part that's not blocked in at the bottom, is there –

MS. ADDISON: Yes, sir.

THE COURT: Is that superimposed, that squared area on the bottom?

MS. ADDISON: No, sir. No, sir, it's [227] not enlarged, it's just marked –

MR. SAUNDERS: The box is superimposed on the map.

THE COURT: That's what I'm asking.

MS. ADDISON: Oh, okay, I'm sorry.

THE COURT: Because if it isn't, the map is wrong.

MR. ROGERS: Right. Right, your Honor, thank you.

THE COURT: Now, from the school to across from the school area to the left-hand side, show what you can. That's the area that he needs to relate it to, if he can.

MS. ADDISON: Maybe I can be a little more clearly [sic]. He has already testified that it was inside the black square, where they stopped.

THE COURT: No question.

BY MS. ADDISON:

Q From which direction did you enter that black square? Which side of the black square did you come in?

(The witness indicated on the map.)

BY MS. ADDISON:

Q Indicating on the left side?

[228] A On the left side.

Q And when you left that area, Mr. Jones, which direction did you leave going out?

A Went back out the same way, the other side (indicating).

THE COURT: The witness indicated, pointing he came in from the left and went out toward the left of the map.

BY MS. ADDISON:

Q In answer to Mr. Rogers' question, Mr. Jones, you indicated that you understand you no longer are facing a death penalty, is that correct?

A That's correct.

Q Do you consider that a benefit to you?

A No, I do not.

Q Why not?

A Number one is when I get into the system, it's no telling what's going to happen to me because I am testifying. Everybody out here knows that I'm testifying against another inmate, which can harm me, no doubt.

Q Any other reasons?

A Like I said, I wanted to testify to tell Mr. Nesbitt and their family the real truth of what happened, my mom, let her know, ease some of the pain, [229] won't ever bring him back, but help them a little.

Q Other than the retribution from other inmates, is there any other reason that you don't consider that a benefit?

A Well, number one, I have two little boys and I'm not going to be with them. They are growing up. One is going to school, and I've missed all that. I missed my father's funeral. It's a lot of things I might miss out here. So to me, I'm not going to exist anyway, so what's the difference.

MS. ADDISON: Thank you.

I have no further questions, your Honor.

THE COURT: Mr. Rogers.

MR. ROGERS: Nothing further, your Honor.

THE COURT: Before you leave the stand, Mr. Jones, put that Exhibit Number 3 back up there with a pin. If you would, without infringing upon the area where you say the gun is, would you put an arrow directed to where the gun is.

THE WITNESS: With this pen, sir?

THE COURT: Yes, with the pen.

(The witness marked on the photograph.)

[230] THE COURT: From the top or the bottom, whichever. All right. Thank you.

The witness has now identified on the exhibit.

MS. ADDISON: Commonwealth's Exhibit Number 3, I believe.

THE COURT: That's Exhibit Number 3. All right.

You can return the witness to the proper quarters.

MR. ROGERS: I wouldn't like him released, though.

THE WITNESS: You don't have to worry about that.

MR. ROGERS: Keep him available as a witness, what I mean by that, your Honor.

MS. ADDISON: Call him as your witness?

MR. ROGERS: Remains to be seen.

MS. ADDISON: Commonwealth calls Stephen Burton.

THE COURT: Stephen Burton.

THE CLERK: Stephen Burton, please come into the Courtroom. Stephen Burton.

THE COURT: He has not been sworn?

* * *

[Entered As Exhibit In Atkins Trial February 12, 1998]

VIRGINIA: **IN THE CIRCUIT COURT FOR THE COUNTY OF YORK AND THE CITY OF POQUOSON**

COMMONWEALTH OF VIRGINIA	:	**DOCKET NO. 8230**
v.	:	
WILLIAM ALFREDIC JONES,	:	
Defendant	:	

MEMORANDUM OF PLEA AGREEMENT

This Memorandum of Plea Agreement is presented to the Circuit Court for the County of York County and the City of Poquoson, in compliance with Rule 3A:8(c)(2) of the Rules of the Supreme Court of Virginia.

PART I

The Defendant currently stands charged with MURDER (Indictment No. 1), ABDUCTION (Indictment No. 2), ROBBERY (Indictment No. 3), and three (3) Counts of USE OR DISPLAY FIREARM IN COMMISSION OF A FELONY (Indictment Nos. 4, 5 and 6).

PART II

The Commonwealth of Virginia, by and through Eileen M. Addison, Commonwealth's Attorney for York County and the City of Poquoson, and the Defendant, William Alfredic Jones, with the advice and consent of his

Attorneys, Leslie P. Smith, Esquire, and Timothy G. Clancy, Esquire, hereby agree as follows:

1. The Defendant agrees to plead Guilty to all six (6) of the indictments referenced in Part I of the agreement. The Defendant also agrees that the Circuit Court for York County and the City of Poquoson has jurisdiction over these charges and, if presented, the Commonwealth's evidence would be sufficient to prove the Defendant's guilt to each charge, beyond a reasonable doubt.

2. The Defendant agrees to fully cooperate and be truthful with the Commonwealth's Attorney's Office for the County of York and City of Poquoson and the investigators and other personnel of the York County Sheriff's Department and provide all information known to the Defendant relating, in any fashion, to the abduction, robbery and murder of Eric Michael Nesbitt on or about August 17, 1996. Among other things, the Defendant agrees to:

   a. Testify truthfully and completely in any trial or other criminal proceedings brought against Daryl Renard Atkins for the criminal charges referenced in Part One of this agreement.

   b. Be reasonably available for such pretrial conferences and interviews as the Commonwealth may deem appropriate.

3. It is further agreed and understood between the Commonwealth of Virginia, the Defendant, William Alfredic Jones, and his attorneys, Leslie P. Smith, Esquire, and Timothy G. Clancy, Esquire, that if it becomes apparent, for whatever reason or from whatever source, that the Defendant has failed to be completely truthful and/or has failed to fully cooperate with the Commonwealth, as required by this agreement, the Commonwealth shall be released from all

obligations imposed upon it by the terms of this agreement. Whether the Defendant has breached any provision of this agreement shall be determined by the Court in an appropriate proceeding at which all the Defendant's disclosures shall be admissible. The Commonwealth shall be required to prove a breach of this agreement by a preponderance of the evidence.

4. If the Defendant abides by the terms of this agreement, the Commonwealth shall not utilize any truthful information provided by the Defendant pursuant to this agreement against the Defendant in any other criminal proceeding in York County, Virginia except in a prosecution for perjury, or a perjury-related offense. If the Defendant violates any provision of this agreement, however, it is specifically understood and agreed that the Commonwealth shall have the right to utilize all information given by the Defendant, together with any derivatives thereof, for such purposes as the Commonwealth deems advisable.

PART III

In exchange for the Defendant's cooperation as described above, and upon the Defendant's complete performance of the terms of this agreement, the Commonwealth agrees to:

1. Move the Court to vacate its finding of guilt on Indictments No. 2, 3, 5 and 6,and,

2. Subpoena an Investigator from the York County Sheriff's Department to testify regarding the Defendant's cooperation with the Commonwealth, pursuant to this agreement, and ask the sentencing Judge to consider that cooperation favorably in imposing sentence on the Defendant.

PART IV

It is lastly agreed and understood that this agreement extends only to the charges arising from the abduction, robbery and murder or Eric Michael Nesbitt on or about August 17, 1996, as set forth in Docket No. 8230 now pending before the Circuit Court for York County and the City of Poquoson and in no way extends to any other case against the Defendant, if any should exist. This is the only agreement between the Commonwealth of Virginia and William Alfredic Jones concerning his cooperation in this matter and there are no other agreements, deals, bargains, or understandings that modify or alter this agreement.

PART V

In accordance with the provisions of subparagraph (c)(1)(C) of said Rule 3A:8, the Commonwealth and the Defendant have agreed to jointly move the Court to order the preparation of a presentence report by the Parole and Probation Officer of the York/Poquoson Circuit Court and each reserves the right to argue the appropriate disposition of these cases at the sentencing hearing. All parties hereto understand and agree that the Court is not bound by and need not impose a sentence within the sentencing guidelines range, but may impose any sentence allowed by law. The Defendant understands that any estimate of the probable sentencing range under the sentencing guidelines that the Defendant may have received from the Defendant's counsel, the Commonwealth or any other source is, at most, a prediction and not a promise and is not binding on the Court. The

Commonwealth makes no promise or representation regarding what sentence the Defendant will receive and the Defendant agrees that he cannot withdraw his guilty pleas based upon the actual sentence received.

I HAVE READ AND REVIEWED THE TERMS OF THE FOREGOING AGREEMENT AND AGREE TO ABIDE BY ITS TERMS. I UNDERSTAND THE CONSEQUENCES OF MY FAILURE TO DO SO AND AM DOING SO FREELY AND VOLUNTARILY.

Agreed to this 5th day of September, 1997

/s/ William A. Jones
William Alfredic Jones,
Defendant

/s/ Leslie P. Smith
Leslie P. Smith,
Esquire
Counsel for Defendant

Leslie P. Smith for

/s/ Timothy G. Clancy
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/s/ Eileen M. Addison
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York County and the
City of Poquoson

Accepted
Filed 9/5/97
Prentis Smiley Judge

JOINT

APPENDIX

VOL. II

No. 00-8452 (10)

Supreme Court, U.S.
FILED

In The

Supreme Court of the United States

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

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VIRGINIA: IN THE CIRCUIT COURT
FOR THE COUNTY OF YORK

COMMONWEALTH OF VIRGINIA	:	CASE NO. 96-8229 (6)
VS	:	
DARYL RENARD ATKINS	:	

Stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and all other incidents during the second day of trial in the above-styled cause, held in the Circuit Court for the County of York at Yorktown, Virginia, on February 13, 1998, before the Honorable Prentis Smiley, Jr., Judge of said Court, and jury.

—oOo—

[18] Daryl Atkins

members of the jury in the box. Do you waive poll?

MR. ROGERS: Yes, your Honor, we do.

MS. ADDISON: Yes, sir.

MR. ROGERS: If it please the Court, call Daryl Renard Atkins. He has not been sworn, your Honor.

THE COURT: All right. Swear the witness, please.

(The Defendant was duly sworn.)

MR. ROGERS: Take the stand, please, sir.

DARYL ATKINS,

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ROGERS:

Q Yes sir. Lean close to the microphone, speak up so the Judge and the ladies and [19] gentlemen of the jury can hear you.

State your name and date of birth, please, sir.

A Daryl Atkins.

Q You don't have to swallow it. Just sit comfortable. I think we can hear you.

A Daryl Atkins, 11-6-77.

Q Okay. Mr. Atkins, you are the Defendant in this matter?

A Yes, sir.

Q And as of today, you stand charged before this Court and jury with the charges of capital murder and use of a firearm in that capital murder, is that correct?

A Yes, sir.

Q Mr. Atkins, directing your attention – excuse me, before we do that, how far did you go in school, Mr. Atkins?

A Eleventh grade.

Q Okay. And what school was that?

A Bethel High School.

Q Okay. You can sit up. You can sit up. Just try and answer, I think we can hear you. There's a good sound system in here.

You went through the eleventh grade [20] at Bethel High School?

A Yes, sir.

Q And when did you complete the eleventh grade?

A What, the year?

Q Uh-huh.

A '96.

Q '96. Okay. Mr. Atkins, you have been convicted of felonies, is that correct?

A Yes, sir.

Q You have pled guilty to the four felonies related to this matter of robbery, abduction and two use of fire-arm charges in commission of those offenses that's related to this, is that correct?

A Yes, sir.

Q In addition to those, you have been convicted of twenty-one felonies, sir?

MS. ADDISON: Excuse me, your Honor I would ask that the questions not be leading.

MR. ROGERS: Okay, I'll rephrase.

BY MR. ROGERS:

Q Other than the four, how many – or how many total felonies have you been convicted of, Mr. Atkins?

A Twenty-five.

[21] Q Okay. Have you also been convicted of any misdemeanors involving stealing?

A One.

Q One. Okay. How old were you at that time?

A Thirteen.

Q Okay. Now, Mr. Atkins, directing your attention, sir, back to the evening hours of August 16, early morning hours of August 17, 1997, did you know William Jones at that time?

A Yes, sir.

Q Where, at around 11:30 that evening, did you and Mr. Jones go, if anywhere?

A Can you repeat it?

Q At 11:30 on the night of August 16, 1996, where, if anywhere, did you and Mr. William Jones go?

A To the 7-Eleven.

Q And what was the purpose of going to the 7-Eleven that evening?

A To rob.

Q And who did you come into contact with, if anybody, once you and Jones got back – got down to that 7-Eleven?

A Eric Nesbitt.

[22] Q Okay. Had you known him before that night?

A No, sir.

Q Okay. What happened in the confrontation with Eric Nesbitt?

A Me and William Jones was on the side of the 7-Eleven, and we was planning to rob somebody. And William Jones had the gun.

Q Whose gun was that?

A One of our friend's.

Q What's his name?

A Mark.

Q Okay. Okay. What happened with William Jones, who had Mark's gun?

A Then Eric Nesbitt backed out of the parking lot and was coming out the 7-Eleven parking lot. William Jones waved him down. Then he had a conversation with him. So I came up to the driver, that's where he was at, William Jones.

Q Who was at the driver's side?

A William Jones.

Q Okay. And where did you come up to?

A The driver's side.

Q Okay. What happened then?

A We started chatting for a while, and [23] then William Jones pulled out the gun.

Q Okay. What happened then?

A Then he told me get around.

Q Who told you?

A William Jones.

Q And what did you do?

A Go around in the passenger.

Q And what did you do when you got around to the passenger side?

A Got in the truck.

Q What happened then?

A William Jones got in the driver's side.

Q Okay. Where was Mr. Nesbitt seated?

A In the middle.

Q Okay. What happened now?

A He handed me the gun with both of his hands and I hold the gun. And then William Jones drove off.

Q Okay. Where did you go?

A To Sacramento Drive.

Q Okay. And what happened then?

A He was speeding, so he turned the corner and hit a parked car.

Q What happened – on which side of [24] the truck hit the parked car?

A The right.

Q The right side of the parked car. What side of the pickup truck was hit?

A The left. The driver's side.

Q The driver's side. Okay. Okay What happened after that?

A Then I asked Mr. Nesbitt did he have any money. Mr. Nesbitt say yes. He handed me his wallet. I looked in his wallet, and it was sixty dollars.

Q What did you do with that sixty dollars?

A I took it out of his wallet.

Q What did you then do to the wallet?

A I gave it back to him.

Q Okay. What happened after that?

A Then I looked back in it. And then William Jones glanced back at it and he saw the credit card in there.

Q Okay. What did y'all do then?

A He asked him did he have any more money in the bank.

Q What did y'all do after that?

A We rode to the bank.

[25] Q Who was driving?

A William Jones.

Q Okay. Was that the bank that was pictured in the big chart as being the Crestar over at the Coliseum Crossing in Hampton?

A Yes, sir.

Q And this – before this had been down by the 7-Eleven near Tidemill Apartments on Sacramento?

A Yes, sir.

Q Okay. All in Hampton?

A Yes, sir.

Q Tell me what happened when you all got to the – to the Crestar Bank.

A Then Eric Nesbitt took out his credit card. He leaned over William Jones, placed his credit card, you know, in the machine. Then he hit the numbers and then he got the money back.

Q Okay. Do you know how much money came back?

A Two hundred.

Q Two hundred dollars?

A Uh-huh.

Q Okay. What was done with the money?

A He gave it to me.

[26] Q Who gave it to you?

A Eric Nesbitt.

Q Eric Nesbitt did?

A Uh-huh.

Q What did y'all do then?

A We drove off, William Jones.

Q Where was the gun?

A I still had it.

Q You had it. Okay. Jones drove off then, is that right?

A Uh-huh. Yes, sir.

Q Where did y'all drive to?

A He drove to the interstate. And it was a discussion of he was going to tie him up, there was a discussion that me and him was going to tie him up and leave him somewhere. But then William Jones said that he know a place and he never told me. And he just drove.

Q Okay. Now, where was he driving? On what road, if you know, at the time this discussion took place about he knew a place?

A On the interstate.

Q On the interstate, Interstate 64?

A Yes.

Q Which direction was that heading, [27] Mr. Atkins, up towards Williamsburg or down towards the bridge tunnel?

A Towards Williamsburg.

Q Okay. Describe what happened on the trip, and where you went and where Jones drove after you were heading up in the direction of Williamsburg on I-64.

A Well, we got off at Lee Hall exit. And we came to the – a stop light and there was a 7-Eleven across the street. Then we drove across the intersection. Then we made a right down a long street. And then –

Q Do you know which street that was?

A I do now.

Q Did you know that night what street it was?

A No, sir.

Q Okay. What street do you now know that to be?

A Crafford Road.

Q Okay. Had you been down that road before?

A No, sir.

Q Okay. Who was driving?

A William Jones.

[28] Q Who was giving directions, if anybody, as to where to go?

A William Jones.

Q Okay. Tell the ladies and gentlemen of the jury what happened after that, after you drove down Crafford Road.

A We got on – we got on Crafford Road and William Jones drove halfway up the street, he stopped. He told

me to get out, me and Eric Nesbitt to switch places. He never said why. So I hand – he told me to hand him the gun. I hand him the gun. I got out first. Eric Nesbitt got out behind me. I got back in. Eric Nesbitt got back in. William Jones still had the gun. He put it in a holster that he had on his belt, a black nylon holster.

Then he drove up the street a little more. And then I noticed it was like a fork in the road. So then he stopped and backed up. And then he backed up, parked the car, and he opened up the door.

Q Which door?

A The driver door.

Q Okay. What happened then?

A He told Eric Nesbitt to get out.

Q And what happened at that point?

A Eric Nesbitt got out.

[29] Q Which side of the vehicle did Nesbitt get out of?

A The passenger.

Q Who opened the passenger door?

A Eric Nesbitt.

Q Okay. Where were you at that time?

A In the middle.

Q What happened then?

A As Eric Nesbitt was getting out, William Jones got out, too. So by the time Eric Nesbitt got out the

vehicle, William Jones was there. He had came around the back of the truck.

Q What happened then?

A He – Eric Nesbitt bend over and William Jones told him to get up. And he didn't get up. And then the shooting started.

Q Who was shooting?

A William Jones.

Q Could you see the gunshots?

A I saw the flashes.

Q The flashes? How many guns were out there, Mr. Atkins?

A One.

Q And who had that gun?

A William Jones.

[30] Q Do you know how many – approximately how many shots were fired?

A There was a lot.

Q Okay. And where were you when all these shots were fired?

A In the middle.

Q In the middle of what?

A In the middle of the Nesbitt truck.

Q So you were still in Mr. Nesbitt's truck?

A Yes, sir.

Q Okay. Were you on the driver's side, passenger side, or where?

A The passenger side.

Q What happened then? The shots had started firing, what happened then?

A Then I felt – my leg was hurting, so I reached down to look at my leg.

Q Which leg was that, sir?

A My left.

Q Okay. Where on your left leg?

A On my – on the top.

Q The top of your left leg?

A The top of my ankle.

Q The top of your ankle. Okay. What [31] happened then?

A Then I didn't hear no more shots. And then William Jones got inside the driver's – he came back around, got inside the driver's and took off.

Q Took off. Okay. What did – did you and Mr. Jones have any conversation at that point?

A I asked him why did he shoot him. He told – he didn't answer. And then he kept saying how did he shoot me. He was trying to figure out how did he shoot me.

Q Who was trying to figure out how he shot you?

A William Jones.

Q William Jones was trying to figure how he shot you?

A Yes, sir.

Q Okay. Had there been any conversation between you and Jones as to your being shot?

A I told him to take me – I asked him, William Jones to take me to the hospital.

Q Okay. Was there any talk about why you would want to go to the hospital?

A Because my leg was hurting.

Q From what?

[32] A From the bullet.

Q Okay. Did y'all have a pleasant conversation with one another?

A No, sir.

Q Okay. Who was driving at that point?

A William Jones.

Q Okay. And where did he drive to?

A The hospital.

Q Okay. At the time before you left that area off of Crafford Road, did you see Mr. Nesbitt, after the shots?

A Oh, no.

Q You didn't?

A Huh-uh.

Q Had you gotten out of the vehicle?

A No, sir.

Q Did you ask or have any conversation with Mr. Jones about Mr. Nesbitt after all the shots had rang out?

A Yes, sir.

Q Okay. And what conversation was that?

A I asked him where did he shoot him at. He said he shot him in the body.

[33] Q Where did he then take you?

A To Riverside Hospital.

Q All right. Did you receive treatment at Riverside Hospital?

A Yes, sir.

Q Were x-rays taken of you at Riverside Hospital?

A Yes, sir.

Q Okay. What kind of story did you tell them at Riverside when you got in there that night?

A I told them that I got robbed.

Q Was that the truth?

A No, sir.

Q Why did you tell them that?

A Because I didn't want them to know I was involved with a robbery.

Q Mr. Atkins, after – when were you arrested – excuse me, when were you arrested on charges of murder and robbery and abduction?

A August the 21st, 1996.

Q Of 1996? At the time you were arrested, did – you were arrested by the police including York County Investigator Troy Lyons?

A Yes, sir.

[34] Q Do you know what it means to be advised of your Miranda Rights?

A Yes, sir.

Q Did that occur?

A Yes, sir.

Q Okay. Did you then, after you were read those rights, did you make a statement to the police?

A Yes, sir.

Q Okay. And what did you tell them in the statement, basically?

A I told them that William Jones pulled the trigger.

Q Okay. Did you make any statements about the robbery?

A Yes, sir.

Q Did you make any statements about the abduction?

A Yes, sir.

Q Did you make any statements about the killing of Eric Nesbitt?

A Yes, sir.

Q And this was on August 21st, 1996?

A Yes, sir.

Q Did you – did you make a statement [35] that you were or were not involved in the killing of Eric Nesbitt?

A Yes, sir.

Q Yes, sir, what?

A I told them that I won't involved, that I didn't kill him.

Q That you didn't kill him?

A Yes, sir.

Q Did you tell them who the triggerman was?

A Yes, sir.

Q And who was that?

A William Jones.

Q Have you ever made any statement to the contrary since August 21, 1996, all that time between then and now, that anyone else shot Eric Nesbitt?

A No, sir.

Q At the time of that statement, were you aware of any other statements that had been made by any other individuals that ended up being involved in your case?

A No, sir.

Q Did you have any information at that time of any lab reports?

[36] A No, sir.

Q Or what evidence that the Commonwealth and the Police Department may have?

A No, sir.

Q Do you know what type of murder or what degree of murder you were charged with first?

A First degree.

Q First degree. Okay. Was that later changed?

A Yes, sir.

Q To what?

A Capital murder.

Q Okay. And that's what you're still charged with today?

A Yes, sir.

Q Had you made yourself available and stated your agreement to be a witness for the Commonwealth in these matters?

A Yes, sir.

MS. ADDISON: Your Honor, again, this is an area that was discussed in pretrial motion.

MR. ROGERS: I don't –

MS. ADDISON: If I might –

THE COURT: Okay. The same concern that you had before?

[37] MS. ADDISON: Yes, sir.

THE COURT: All right. Would you come up here, please, ma'am, to the side bar.

(The Court and counsel for both sides and the Court Reporter went to side bar.)

MS. ADDISON: Your Honor, again, we have discussed repeatedly that he's going into an area about the charging decisions and the Commonwealth's theory of who was the triggerman in this case and why it was changed and when it was changed, and the fact that we initially had him charged with first degree and then later changed it to capital. And he gets into that whole area that we discussed. Again, he's going to argue why it was changed and what the Commonwealth or law enforcement officers believed initially and what they learned later on.

MR. ROGERS: If it please the Court, my question to Mr. Atkins was, did you make yourself available and agree to testify for the Commonwealth.

THE COURT: That's the question.

MR. ROGERS: That has nothing to do with what the Commonwealth does, or says, or their opinions, or what they do or do not want to do. It's what's in his mind and what he believed, solely.

[38] MS. ADDISON: Additionally, he's still leading this witness by the hand. He's testifying, not the witness.

THE COURT: I can stop that part of it. The question is innocuous and does no harm. Let's address –

MS. ADDISON: The next question across, did the Commonwealth ever tell you that you were going to be a witness, putting my office as a witness right back in that same position I'm being put in of having someone from my office to testify as to how we planned to proceed, whether or not we ever believed him and whether or not we ever intended to use him as a witness.

MR. ROGERS: No, we are proscribed by the Court's ruling –

MS. ADDISON: Well, it looks like that's the direction you're going.

MR. ROGERS: – I've asked the question if he was – if he made himself available to the Commonwealth to testify. And I think that's a proper question. I think he has a right to make that answer. And I don't intend to go any farther with it.

THE COURT: All right. Fine. leading him. You know how to ask the questions, who, [39] what, why, where and when.

MS. ADDISON: I object to every single question. Every question is leading. It makes it look bad on me.

MR. ROGERS: After the next question he's going to be yours.

(The Court, counsel for both sides and the Court Reporter returned from the side bar.)

THE COURT: You may repeat the question.

MR. ROGERS: That would be my request, if the Court please, that the Court Reporter repeat the question, so the precise question is given.

THE COURT: Thank you.

(The Court Reporter read the pending question and answer.)

THE COURT: All right. Next question.

MR. ROGERS: If I could have just a moment.

(Defense Counsel conferred.)

MR. ROGERS: Just one more question.

BY MR. ROGERS:

Q Again, with the repeat, Mr. Atkins, [40] and that is, who shot Eric Nesbitt?

A William Jones.

Q Did you shoot a gun that night of August 17, 1996?

A No, sir.

MR. ROGERS: Answer any questions that the Commonwealth may have.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MS. ADDISON:

Q Mr. "Jones," you said you have been convicted of how many felonies?

THE COURT: This is Mr. Atkins.

MS. ADDISON: I'm sorry.

Mr. Atkins. Looking at my note.

BY MS. ADDISON:

Q Mr. Atkins, in answer to your attorney's questions you think you've been convicted of how many felonies?

A Twenty-five.

Q That includes the ones involved in this case?

A Yes.

[41] Q Are you sure?

A Yes.

Q In answer to Mr. Rogers' questions, you talked about a statement that you gave on August 21st of 1996 to Investigator Lyons.

A Yes, ma'am.

Q Do you recall that? You said you told him the truth about what you had done with the robbery and the abduction?

A Yes.

Q Right? You told him the truth about what had happened?

A Yes, uh-huh.

Q Didn't you, in fact, during that statement, Mr. Atkins, say that you had gotten shot in the leg when you jumped in front of the gun to try to save Mr. Nesbitt's life?

A Yes.

Q That wasn't the truth, was it?

A No.

Q Didn't you also tell them during that statement that Mr. Jones had kidnaped you at gunpoint and made you get in the truck?

A Yes.

Q Was that the truth?

[42] A No.

Q Didn't you also, Mr. Atkins, tell them that you never held the gun and that Mr. Jones had the gun on Mr. Nesbitt while you were at the bank?

A Yes.

Q Was that the truth, Mr. Atkins?

A No.

Q Didn't you tell them during that statement that you didn't know anything about any intent to rob anyone before you went to the 7-Eleven?

A Yes.

Q But this morning you say that you and Mr. Jones went there for that purpose?

A Yes.

Q Which one is the truth, Mr. Atkins?

A We planned to rob somebody.

Q Where were you when you made that plan?

A On the way to the 7-Eleven.

Q So what you told the investigators on August 21st of 1996 wasn't the truth, was it?

A No.

Q Didn't you also, on August 21st of 1996, tell the investigators that you had no idea where Mr. Jones had gotten the gun? Do you recall making [43] that statement, Mr. Atkins?

A No. No.

Q You don't? Do you recall telling them that you got shot once in the leg, that you only heard one shot?

A No, I don't remember that.

Q You told them repeatedly on August 21st of 1996, did you not, Mr. Atkins, that you never had that gun in your hand?

A Yes.

Q Was that the truth, Mr. Atkins?

A No.

Q You told them, did you not, on August 21st that when you were at the bank Mr. Jones had the gun pointed at Mr. Nesbitt?

A Yes.

Q Was that the truth, Mr. Atkins?

A No.

Q Your testimony here today is that Mr. Jones pulled the gun and told you to get in the truck, is that correct?

A Yes.

Q And then he handed you the gun with both hands?

A Yes.

[44] Q And where were you when he handed you the gun?

A In the passenger seat.

Q And where was Mr. Nesbitt?

A In the middle.

Q So you're telling this jury that he handed the gun across in front of Mr. Nesbitt to you?

A Yes.

Q And Mr. Nesbitt did nothing?

A Yes.

Q Today you said that after the money was withdrawn from the bank that Mr. Nesbitt gave you the two hundred dollars, is that right?

A Yes.

Q Do you remember what you told Investigator Lyons on August 21st of 1996 what happened to that money?

A No.

Q Isn't it a fact, Mr. Atkins, that you told Investigator Lyons on August 21st that all that money was given to William Jones?

A Yeah, I might have told him that.

Q You might have told him that? Was that the truth?

A No.

[45] Q No, it was not. Are you sure? Was that the truth or what you're saying today the truth?

A What I'm saying today is the truth.

Q And where did this gun come from?

A Mark.

Q Mark?

A The guy that lived behind me.

Q What's Mark's last name?

A Dallas.

Q Mark Dallas. And how long have you known Mark Dallas, Mr. Atkins?

A Since I've been living with my father.

Q And how long is that?

A Three months.

Q Isn't it a fact that Mr. Dallas is your friend?

A No.

Q But he came to your apartment, did he not?

A He's me and Mr. Jones' friend.

Q He's your friend as well, is that right?

A Yes.

Q Well, you testified earlier that he [46] was Mr. Jones' friend?

A I said me and Mr. Jones' friend.

Q He was both. But you know his last name?

A Yes.

Q And you testified here today that that's where the gun came from?

A Yes.

Q But you didn't know that on August 21st of 1996, is that correct?

A I might have said that.

Q You might have said that you didn't know where the gun had come from? Isn't it true that on August 21st of 1996 you told Investigator Lyons that William Jones brought that gun to your apartment?

MR. ROGERS: You have to answer.

THE WITNESS: Yes, I said that.

BY MS. ADDISON:

Q Was that the truth or what you're saying today the truth, Mr. Atkins?

A What I'm saying today is the truth.

Q But you told me on my very first question that you told them the truth on August 21st of 1996, did you not?

A Yes.

[47] Q So what you told me was not the truth, is that the right answer?

A No, what I said in that statement.

Q What you said in the statement is the truth?

A No.

Q It's not the truth?

A Yes.

Q Do you remember what the gun looked like, Mr. Atkins?

A Marble handle.

Q Marble handle?

A Brown marble handle.

Q And how do you know what it looked like?

A Because I saw it.

Q You held it, did you not?

A Yes.

Q You held it all the time you were in that truck?

A Not all the time.

Q Not all the time. You had it at the bank, didn't you?

A Yes.

Q But that's not what you told them [48] August 21st of 1996?

A Yes.

Q So you lied on August 21st of 1996?

A Yes, I have.

Q And you lied to the hospital, didn't you, on August 17th, when you got there, told them that you had been shot right outside the hospital?

A Yes.

Q You lied then, didn't you?

A Yes.

Q And when Officer Tutone came and you could have told him about Eric Nesbitt laying out on Crafford Road, you didn't tell him the truth, did you?

A No.

Q You told him what, that you had been robbed by Deer Park and shot?

A Yes.

Q And told him you had hopped on one leg for almost two miles?

A Yes.

Q Was that the truth, Mr. Atkins?

A No.

Q No, it was not. Were you ever near Deer Park during those hours?

A No.

[49] Q That wasn't the truth either, was it?

A No.

Q Do you recall on August 21st of 1996 telling Investigator Lyons that you were afraid William Jones was going to shoot you?

A Yes. Yes.

Q That's why you didn't tell Officer Tutone the truth?

A Can you repeat the question?

Q Did you not tell Investigator Lyons on August 21st of 1996 that the reason you lied to Nurse McIntyre at the hospital and the reason you lied to Officer Tutone was because you were afraid of William Jones, that he was going to come and shoot you?

A Yes.

Q But you were in the safety of a hospital, were you not, Mr. Atkins?

A Yes.

Q You had a police officer right there that you could have told the truth to?

A Yes.

Q But you didn't, did you?

A No.

Q Do you recall telling Investigator [50] Lyons on August 21st of 1996 that the gun was black with a brown handle?

A Yes.

Q But you say today it was a marble handle?

A Marble brown.

Q But you didn't tell Investigator Lyons that on August 21st, did you?

A I told him that it was a brown handle.

Q Do you know the difference between marble and brown?

A No.

Q No, you don't?

THE COURT: Answer the question, Mr. Atkins.

THE WITNESS: No, I thought they were the same.

BY MS. ADDISON:

Q You thought that brown and marble was the same. Did you think that a .22 and a .380 was the same?

A Huh-uh. No.

Q What type of gun was it, Mr. Atkins?

A A .380.

[51] Q A .380. Do you recall on August 21st of 1996 you told Investigator Lyons it was a .25 or a .22?

A No, I don't recall saying that.

Q You don't recall that.

Page six, counselor.

"Lyons: Was it a revolver or was it a semiautomatic?

"Atkins: I'm not sure what it – I'm not sure what it was. It was a small – I know it was either a .25 or a .22, something like that."

Do you recall saying that now, Mr. Atkins?

A Yes.

Q But that's not what it was, was it?

A No.

Q And that wasn't the truth?

A No.

Q And you knew when you were holding that gun on Eric Nesbitt at the bank that it wasn't a .22?

A Yes.

Q But you didn't tell Investigator Lyons the truth, did you, Mr. Atkins?

A No.

[52] Q Do you recall telling Investigator Lyons, "I ain't going down for nothing"?

A No, I don't remember that.

Q Page 12.

MR. ROGERS: If the Court please, we have one difficulty with the Commonwealth's approach on this, and that is it's taking bits and pieces. I would make a proffer that the reference that the Commonwealth made on the bottom of page six, had she read the next question and the Defendant's next answer it might have brought a little clarity to the situation as to the caliber. And, therefore, I object to this piecemeal approach.

THE COURT: You may have your opportunity to redirect, –

MS. ADDISON: Thank you, your Honor.

THE COURT: – Mr. Rogers.

MS. ADDISON: If I might have Commonwealth's Exhibit 3.

BY MS. ADDISON:

Q You've seen this photograph before, have you not, Mr. Atkins?

A Yes.

Q Do you recognize that photograph?

A Yes.

[53] Q And that is you in that picture, is it not?

A Yes, it is.

Q And what do you have in your hand, Mr. Atkins?

A A gun.

Q The gun that you told Investigator Lyons you never held at the bank, isn't that true?

A Yes.

Q Let's talk about your testimony here today, Mr. Atkins. Your statement is that you and Mr. Jones planned a robbery and you walked up to the driver's side where Mr. Jones was already standing, chatting with Mr. Nesbitt, is that what you said?

A Yes.

Q And Mr. Jones pulled the gun and told you to go around?

A Yes.

Q He didn't point the gun at you at that point, did he?

A No.

Q Not like you told Investigator Lyons on August 21st, that wasn't the truth, –

A No.

Q – nobody ever pointed the gun at [54] you, did they?

A No.

Q Nobody forced you to do anything, did they?

A No.

Q You're saying that you hit a parked car on the right side?

A Yes.

Q And your testimony here today was that you took the cash from Mr. Nesbitt's wallet, is that right?

A Yes.

Q Do you recall on August 21st of 1996 you told Investigator Lyons that it was Mr. Jones who took the cash from Mr. Nesbitt?

A No, I didn't say that.

Q You didn't say that? Are you sure of that?

A I don't recall it.

Q You don't recall.

And you say that Mr. Jones had some sort of holster for this gun of Mark's?

A Yes.

Q Where was that holster, Mr. Atkins?

A On the belt of William Jones.

[55] Q On his belt?

A Uh-huh, yes.

Q He had a holster attached to his belt?

A Yes.

Q And you're saying that you had the gun now, that's your story today, you have the gun –

A I had the gun at the ATM.

Q When did you first get the gun, Mr. Atkins?

A When we got in the truck.

Q When you got in the truck. Oh, when he handed it to you across in front of Mr. Nesbitt?

A Yes.

Q And you held it on Mr. Nesbitt from the 7-Eleven through the residential area where you hit the parked car, isn't that right?

A Yes.

Q And you held it on Mr. Nesbitt all the way to the bank?

A Yes.

Q And that picture of you shows you holding it on him at the bank?

A Yes.

Q And you continued to hold it on him [56] all the way to York County, didn't you?

A Yes.

Q But that's not what you told Investigator Lyons on August 21st of 1996, is it? That's not the same story, is it, Mr. Atkins?

A No.

Q And your story here today is that you got to Crafford Road and Mr. Jones told you to give him the gun?

A Yes.

Q And how did you do that?

A You want me to demonstrate?

Q I want you to describe it, please.

A I hold the gun like this (demonstrating).

Q In both hands, and you swung it out in front of you, in front of Mr. Nesbitt?

A Yeah.

Q Who sat quietly and did nothing?

A Yes.

Q And Mr. Jones was driving at that point?

A No.

Q He had stopped?

A Yes.

[57] Q I see. And where had he stopped?

A On Crafford Road.

Q On Crafford Road. Do you know where on Crafford Road?

A Before we got – before he got to the fork.

Q And your testimony is he then put the gun in the holster, is that right?

A When I gave it to him?

Q Yes, sir. That's what your testimony was. Jones told me to give him the gun. I gave it to him and he put it in the holster.

A No, that ain't true.

Q Do you know what's true, Mr. Atkins?

A Yes.

Q Is it like you told Investigator Lyons on August 21st, that you never had the gun, or is it that Mr. Jones gave it to you and then took it back and put it in a holster, or is it that you had the gun still at that time?

A I gave it to Mr. Jones.

Q You gave it to Mr. Jones. But you don't know what he did with it now?

A He didn't put it in the holster.

Q He didn't. A few minutes ago you [58] testified that he put it back in the holster.

A I didn't say that.

Q You didn't say that. And then you testified that you got out of the truck and Mr. Nesbitt got out of the truck?

A Yes.

Q And you're standing in the woods in the dark on Crafford Road. And then what happened, Mr. Atkins?

A Then he – I got back in the truck.

Q You got back in the truck?

A Yes.

Q And then what happened?

A Eric got back in the truck.

Q You're telling this jury that a 21-year-old, fit man, military trained, Boy Scout, hiking, camping, voluntarily got back in that truck with you and Mr. Jones?

A Yes.

Q And then you drove down the road further?

A Yes.

Q How fast were you going?

A I don't know.

Q You don't know. Were you going [59] fast, slow, do you have any idea?

A Not really fast.

Q Not really fast. And the gun was in the holster at that point?

A Yes.

Q He wasn't crammed in that little truck with the three of you with a gear shift lever and holding a gun, was he?

A No.

Q The gun had been put away, is that your testimony?

A Yeah.

MR. ROGERS: If the Commonwealth could make clear who the he is. We have three people – two other people besides the Defendant. And she's saying he –

MS. ADDISON: I'll be happy to do that, your Honor.

BY MS. ADDISON:

Q Mr. Jones is driving, is that your testimony?

A Yes.

Q And he was driving Mr. Nesbitt's little truck?

A Yes.

[60] Q And it's your testimony at this point you all had gotten out and you had gotten back in the middle and Eric Nesbitt had gotten right back in with you, so you were in between the two of them?

A Yes.

Q With that gear shift lever right up by your legs, or in between your legs, probably, right?

A Yes.

Q Where was it, do you recall?

A I don't think it was in between my legs.

Q Were your legs on the right-hand side of it or the left-hand side of it?

A The right.

Q And Mr. Jones wasn't shifting gears and driving and holding that gun on Mr. Nesbitt anymore, was he?

A No.

Q And you're saying you didn't have the gun anymore?

A Yes.

Q Is that correct?

A Yes.

Q And Mr. Nesbitt didn't try to jump out?

[61] A No.

Q He just sat there and rode along with you?

A Yes.

Q And then your testimony is Mr. Jones stopped the truck again?

A Yes.

Q And he got out of the driver's side?

A He stopped and backed up.

Q Okay. After he backed up and stopped the truck –

A Uh-huh.

Q – you testified that he got out the driver's side?

A Yes.

Q You didn't mention any trouble he had in doing that, did you?

A He got – he had trouble.

Q He had trouble? How did he get the door open, Mr. Atkins?

A He asked Eric Nesbitt to open it.

Q And Mr. Nesbitt was inside the truck or outside by then?

A He was still inside.

Q He was still inside. He was on the [62] other side of the seat, you were in between?

A Yes.

Q And Jones asked Nesbitt to open the driver's side door for him?

A Yes.

Q Did he get out and come around and open it up?

A No.

Q How did he open it up for him?

A He leaned over me.

Q So he reached across both of you, knowing that Mr. Jones couldn't get the door open, knowing that the gun was in the holster, he reached across – leaned over both of you and opened the door for Mr. Jones, is that right?

MR. ROGERS: If the Court please – excuse me, Madam Commonwealth. Objection to the form of the question. One, she's included about three or four questions in one, and now is getting into the knowledge and the mind of Eric Nesbitt, knowing that the gun was in the holster. There's no evidence whatsoever that Eric Nesbitt knew that the gun was in William Jones' holster.

THE COURT: Overrule your objection.

MR. ROGERS: Note exception for the [63] record.

THE COURT: Note your exception.

BY MS. ADDISON:

Q You couldn't see the gun at that point, could you, Mr. Atkins?

A No.

Q And, fair statement, that if you couldn't see it right next to Mr. Jones, Mr. Nesbitt probably couldn't see it either, could he?

A No, he couldn't.

Q Thank you. But it's your testimony here that he just reached across – leaned across both of you and helped Mr. Jones get out of the truck so he could come around and shoot him?

A Yes.

Q He didn't open his door and jump out and run into those woods?

A No.

Q And you're saying Mr. Nesbitt then got out of the passenger side and didn't run, he bent down and waited for Mr. Jones to come around and start shooting him?

A No.

Q No? Your testimony was that he got out and just bent down?

[64] A No, I said he got out and then William Jones came around and then he bent down.

Q Oh, after Mr. Jones came around?

A Pointed the gun at him.

Q So before he came around, Mr. Nesbitt stood there and waited for him, is that right?

A Yes.

Q Okay. And you were still sitting in that passenger seat in the middle of it?

A Yes.

Q And how many shots did you hear?

A A lot.

Q A lot. Can you be more specific about a lot?

A It was more than five, I know.

Q More than five. How many did you hear before you got shot in your leg?

A I don't know.

Q You don't know. Did you hear any after you got shot in your leg?

A I don't know.

Q You don't know. Do you recall telling Investigator Lyons on August 21st of 1996 that, no, you hadn't jumped – you changed your mind, you [65] hadn't jumped in front of the victim to save his life, you decided you had been in the truck, but you didn't hear any shots after you got shot?

A Yes.

Q Now you don't remember?

A I said I didn't hear no shots because my leg was hurting.

Q And that affected your hearing?

A Yes.

Q And at the time you got shot your testimony is that your left leg was next to the middle of that truck, is that right?

A Yes.

Q Because they are on the right side of the gear shift?

A Yes.

Q In the middle of that truck?

A Yes.

Q Next to the transmission hump?

A Yes.

Q And you didn't move it?

A No. I was – yeah, I was moving it.

Q You were moving it?

A Yeah.

Q Did you move it over to the driver's [66] side where Mr. Jones had gotten out and run out there?

A No, I was going towards the passenger – I was about to come out and then the shot – the shooting started.

Q You were about to come out?

A Uh-huh.

Q But your leg was inside?

A My whole body was inside.

Q Your whole body was inside. So you were thinking about getting out, but you hadn't done it yet, right?

A Yes.

Q You said you never saw Mr. Nesbitt again after you heard the shots, is that right?

A Yes.

Q He had moved so far away from the truck that you couldn't see him anymore, is that your testimony?

A No.

Q You just couldn't see him?

A Yes.

(The attorneys for the Commonwealth conferred.)

BY MS. ADDISON:

Q If you might, Mr. Atkins, if you [67] can, describe or show us how you saw Mr. Nesbitt bent over after Mr. Jones came around the truck.

A Describe?

Q Can you describe how he bent over?

A He humped over.

Q Well, can you be a little more descriptive? How were his legs?

A Excuse me?

Q His legs, how were they, were they touching the ground, were they just bent or what?

A They was just bent.

Q Was he touching the truck?

A He was leaning against the truck.

Q Leaning against the truck. Not against the seat, though?

A No, not against the seat.

Q And was covering up his face, wasn't he?

A He was balled up. I don't know if he was covering up his face.

Q You couldn't see his arms?

A No.

Q He was begging not to be shot anymore, wasn't he?

A Yes.

[68] Q You heard that?

A Yes.

Q But you couldn't hear the shots, right?

MR. ROGERS: Your Honor, if the Commonwealth –

BY MS. ADDISON:

Q Your testimony –

MR. ROGERS: Excuse me, Madam Commonwealth. If she could identify what time she's making reference to, if it's during all the shots, if it's during the shot when he felt the pain in his leg, or some other unspecified time. To ask a generic question, and you couldn't hear the shots, there's no way to answer that question, your Honor, without specifying a time.

MS. ADDISON: I'll withdraw the question.

BY MS. ADDISON:

Q Mr. Atkins, I'm going to ask you the first question I asked you when I started this examination, which you answered yes. Did you tell the truth on August 21st of 1996 to Investigator Lyons?

A I didn't tell him the whole truth.

Q You didn't tell him the whole truth. [69] You didn't tell him much of any truth, did you, Mr. Atkins?

A Yes, I did tell him.

Q You lied to him about a whole number of things, didn't you?

A Yes.

Q And you lied to the nurse at Riverside Hospital about where you got shot, didn't you?

A Yes.

Q And you lied to Officer Tutone about where you were when you got shot, too, didn't you?

A Yes.

Q And you're lying here today, aren't you, Mr. Atkins?

A No.

MS. ADDISON: I have no further questions, your Honor.

THE COURT: Redirect?

MR. ROGERS: Thank you, your Honor.

REDIRECT EXAMINATION

BY MR. ROGERS:

Q Mr. Atkins, when you were shot in [70] the leg, did it leave scars?

A Yes.

Q Are those still visible?

A Yes.

MR. ROGERS: Your Honor, I'd request that the Defendant be able to come down and show the scars on his leg to the jury.

THE COURT: All right. I'll grant that.

MR. ROGERS: Come down, Mr. Atkins.

(The Defendant stepped down from the witness stand.)

THE COURT: You need to stand out further, probably, from the jury so the entire jury panel can see you.

MR. ROGERS: Yeah, move out here, Mr. Atkins. Okay. Pull your pants leg up.

THE COURT: If you all want to come to the rail, you may.

(The witness indicated his leg.)

THE COURT: Does he still have his shoe on? I can't tell.

MR. ROGERS: No, he has taken it off, your Honor. Your Honor, if we could describe for [71] the record –

THE COURT: I'll let you do that, if you like.

MS. ADDISON: Your Honor, there is a – a lot of this already in the record, your Honor.

MR. ROGERS: If the Court please, if I could describe it, there is a scar visible immediately above the left inside ankle bone of the Defendant, Mr. Atkins.

MS. ADDISON: Your Honor, if I might, since there is a ruler that's been admitted into evidence in the case, rather than Mr. Rogers' description of immediately above, we might have something more accurate in measurement.

MR. ROGERS: Okay. I will even accede to the Commonwealth and ask her if she would prefer me to do it from the floor or from the bottom of his foot or where?

THE COURT: Would the Commonwealth like to describe the wound?

MR. ROGERS: Fine. I'll be glad to let the Commonwealth describe it.

Go ahead, Madam Commonwealth.

MS. ADDISON: No, thank you. This is your demonstration.

[72] THE COURT: Allow him to do it then.

MS. ADDISON: Your Honor, I'm simply trying to get something in the record that makes sense to someone reading it.

THE COURT: Certainly.

MR. ROGERS: If the Court please, for matters of the record, Joint Exhibit Number 2, which is a 12-inch and multicentimeter – millimeter and, gosh, I don't know which one I'm going to ask him.

THE COURT: Inch.

MR. ROGERS: Inch. Thank you, your Honor.

Okay. Now, placing the end of this ruler with the number zero at the bottom, the lower scar on the inside – if the Court please, I need to take off the tag so that we can get to that number. From the floor, there is – does it look like four-and-a-half inches? Okay. With the help of the Assistant Commonwealth Attorney, Mr. Hahn, from the floor the lower inside of Mr. Atkins' –

MR. HAHN: Probably closer to four-and-a-quarter inches.

MR. ROGERS: Okay. Four-and-a-quarter inches from the floor to the lower scar and from the floor to the higher scar is –

[73] MR. HAHN: Seven-and-three-fourths.

MR. ROGERS: Again, with the Commonwealth Assistant helping me, seven-and-three-quarters inches from the floor.

Mr. Atkins, if you could turn the other way, now, is there a scar visible on the outside of your leg here?

THE DEFENDANT: Yes.

MR. ROGERS: Could you point to that for the jury.

(The Defendant indicated.)

MR. ROGERS: Okay, the witness has pointed to a scar which I am now measuring, if the Court please, using the inch ruler, Mr. Commonwealth, if you would help me again. From the floor to that scar?

MR. HAHN: It's six.

MR. ROGERS: Six inches from the floor. Six inches from the floor.

Okay. Thank you, sir. That's all the questions I have. You can put your sock and shoe back on.

THE COURT: Any recross, Ms. Addison?

MS. ADDISON: About his [74] demonstration?

THE COURT: Anything, whatever?

MS. ADDISON: No, sir.

THE COURT: You may have a seat beside your lawyer.

Next witness.

MR. ROGERS: The Defense rests, your Honor.

THE COURT: Defense rests. Rebuttal?

MS. ADDISON: No, sir.

THE COURT: All right. Ladies and gentlemen of the jury, that now concludes the evidence, both the Commonwealth's evidence and the Defense evidence. The Court will need some time to assemble the instructions relative to the law, which I will instruct you on. I suggest it may take twenty minutes or so.

MS. ADDISON: Your Honor, I have printed drafts of what I believe we'll need, but I have not had an opportunity to talk with Mr. Rogers to see what they might want or what we can agree on or not agree on.

MR. ROGERS: I think most of these are fairly standard Model Jury Instructions.

* * *

[Guilt Verdict]

[149] your Honor.

THE COURT: Would you be kind enough to hand the verdict to the Bailiff.

Bailiff, may I see the verdict?

BAILIFF HOLT: Yes, sir.

THE COURT: The verdict appears to be in proper form.

Madam Clerk, would you be kind enough to publish the verdict.

THE CLERK: We, the jury, find the Defendant guilty of capital murder, as charged in Indictment Number One.

Members of the jury, is this your verdict and so say you all?

THE JURY: Yes.

THE CLERK: We, the jury, find the Defendant guilty of use of a firearm in the commission of murder, as charged in Indictment Number Four.

Members of the jury, is this your verdict, and so say you all?

THE JURY: Yes.

THE COURT: Would you poll the jury, please, for me, please.

THE CLERK: Melvin Underwood, Senior, are these your verdicts?

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[25] Dennis Tuinei – Direct

[February 14, 1998]

Thank you.

THE COURT: Thank you, Mr. Saunders. Call your first witness.

MS. ADDISON: Thank you, your Honor. Commonwealth would call Dennis Tuinei.

THE CLERK: Dennis Tuinei, come into the Courtroom, please,

DENNIS TUINEI,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Good morning. Would you state your name for the record, please.

A Dennis Tuinei.

THE COURT: Spell it, please.

THE WITNESS: T-U-I-N-E-I.

MS. ADDISON: Thank you.

BY MS. ADDISON:

Q Mr. Tuinei, where do you live?

[26] A Hampton, Virginia.

Q Were you living in Hampton in April of 1996?

A Yes, ma'am.

Q Directing your attention to April 28th of 1996, approximately midnight on that date, do you recall where you were?

A Yes, I was outside of Almost-A-Banc on a pay phone.

Q Were you alone or with someone else?

A No, I was with one of my friends.

Q Excuse me?

A I was with one of my friends.

Q One of your friends? And did you at that time have an encounter with the Defendant in this matter, Daryl Atkins?

A Yes, after two more of my friends arrived.

Q Would you describe for the jury, please, that encounter and what happened.

A At midnight, I was on the pay phone. And when I got off, I turned around and there was three guys there. And we were instructed not to get inside of the car.

Q By who?

[27] A By an unidentified man. They had a gun, told us not to get in. And Mr. Atkins searched my pockets, my friends' pockets as we were on the ground. And he stood over me for a while and he kept asking me what I was looking at. And I guess after a minute or so he hit me in the back of the head with a bottle.

Q Were you injured as a result of that?

A No, I wasn't.

Q Did you have any financial or economic loss as a result?

A Yeah, I had to buy a new pager. And he might have got, like, five bucks off of me.

Q Did you ever receive any reimbursement?

A No, ma'am.

Q Were there any psychological effects or treatment as a result of that encounter?

A Yeah. Yeah, it was. It was –

MR. SAUNDERS: Your Honor, –

THE COURT: Yes, sir.

MR. SAUNDERS: – could we have a side bar on this, please? I hate to do this, but –

THE COURT: All right.

(The Court, counsel for both sides and the Court Reporter went [28] to the side bar.)

MR. SAUNDERS: We're treading on dreadfully dangerous ground. She's getting into trying to put a victim impact statement from another prior crime that is not the issue here. I know if he suffered physical injury and there is still lasting physical injury that may be relevant. But psychological effects, I would object to that being introduced.

THE COURT: The victim impact from another crime, Ms. Addison –

MS. ADDISON: I'll withdraw it. I think it is admissible, but I'll withdraw it.

THE COURT: Okay. Fine.

MR. SAUNDERS: Thank you.

THE COURT: Thank you, sir.

(The Court, counsel for both sides and the Court Reporter returned from side bar.)

MS. ADDISON: I have no further questions of this witness, your Honor.

THE COURT: All right. Do you wish to cross-examine?

MR. SAUNDERS: Briefly, your Honor.

CROSS-EXAMINATION

[29] BY MR. SAUNDERS:

Q Mr. Tuinei, –

A Yes, sir.

Q – you said they had a gun, correct?

A Yes, sir.

Q Daryl Atkins didn't have the gun, is that correct?

A That's correct.

Q All right. And did he actually take any money off of you?

A Yes, he did.

Q That was the five dollars?

A Uh-huh, and my pager.

MR. SAUNDERS: And your pager. All right.

I have no further questions, your Honor.

THE COURT: Thank you.

MS. ADDISON: One question.

REDIRECT EXAMINATION

BY MS. ADDISON:

Q Mr. Tuinei, where was the gun when [30] Mr. Atkins was taking your pager and the cash?

A At the back of my head.

MS. ADDISON: Thank you. No further questions.

MR. SAUNDERS: May I?

THE COURT: Certainly.

MR. SAUNDERS: Thank you, your Honor.

RECROSS-EXAMINATION

BY MR. SAUNDERS:

Q You testified – you recall testifying in Hampton Circuit Court on March 7th, 1997 –

A Uh-huh.

Q – in these particular proceedings?

(The witness nodded his head affirmatively.)

THE COURT: You need to answer, sir.

THE WITNESS: Yes.

BY MR. SAUNDERS:

Q Not in these proceedings but in a proceeding in which –

A I know what you're talking about.

Q The jury doesn't, so I want to make it clear. You testified on March 7th, 1997, Hampton Circuit [31] Court, in connection with your robbery, correct?

A Correct.

Q Now, in that testimony, did you – do you recall stating that the gun was at the back of your head when the money was taken from you?

A No, because I wasn't asked the question where the gun was at.

Q But Mr. Atkins didn't have a gun. You know that for a fact, don't you?

A Yeah, he had a bottle instead.

MR. SAUNDERS: Okay. Thank you.

THE COURT: All right. Any further need for the witness?

MS. ADDISON: No, sir, I don't believe so. Thank you.

THE COURT: All right. Mr. Tuinei, thank you, very much for coming. You're free to go or you may remain in the Courtroom.

Next witness.

MS. ADDISON: John Hultquist.

THE CLERK: John Hultquist, come into the Courtroom, please.

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[32] JOHN C. HULTQUIST,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Good morning. Could you state your name, please.

A My name is John Hultquist. John C. Hultquist.

MS. ADDISON: Oh, have you not been sworn?

THE COURT: Have you been sworn?

THE WITNESS: Yesterday, sir.

THE COURT: All right. You were sworn here yesterday?

MS. ADDISON: He came late, your Honor.

THE COURT: Pardon me?

MS. ADDISON: He was not here in the group just a moment ago that was sworn in its entirety.

THE COURT: Well, just out of an abundance of caution, would you mind standing down out of the chair,

sir. I mean, we haven't done this before, but [33] let me get you sworn in again, please, sir.

THE WITNESS: Okay.

(The witness was duly sworn.)

THE COURT: Thank you. That's just out of an abundance of caution. Your swearing in yesterday would have been fine. You are under oath. Thank you, sir.

THE WITNESS: Yes, sir.

BY MS. ADDISON:

Q Now, Mr. Hultquist, if you would, spell your last name for the Court Reporter.

A H-U-L-T-Q-U-I-S-T.

Q And what city or county do you live in, Mr. Hultquist?

A Newport News.

Q Newport News. Were you living there in April of 1996?

A No, I lived in Hampton at that point.

Q In Hampton? Directing your attention to April 28, 1996, were you living in Hampton then?

A Yes, ma'am.

Q Do you recall where you were on that date at approximately midnight?

A Almost-A-Banc on Mercury Boulevard.

Q What were you doing there?

[34] A Using the pay phone. Actually, one of my friends was using the pay phone.

Q And who was that friend?

A Scott Thompson.

Q All right. Did you have an encounter with the Defendant in this matter, Daryl Atkins, at that time?

A Sure did.

Q Can you describe for the jury what happened?

A Okay. Well, four of us, Scott, Shane, myself and Dennis, we were standing around the pay phone, and three guys came up and proceeded to surround us. And Scott had asked, "Do you need to use the phone?" And one of them, I can't remember which, said, yeah, you know. He said, "Okay, hang on." Okay. And he finished up his conversation, hung up, and we all proceeded to get back in my car.

And one of them said, "Don't get in the car," you know, "and take your belongings out and get on the ground." So we did that. And I got out – I was – by that point, I was towards my door to get into my car, so I was on that side of the vehicle and my other friends were on the other side. So I was pretty much the only one on that side. Got down, and – and, you know, I [35] heard – I heard somebody on the other side talking, saying, you know, "What the fuck are you looking at," you know.

And then, I guess, by that point the other two guys had started back towards their vehicle or wherever it was they got away with, and I heard a bottle hit the ground.

So I kind of got up, and looked over, you know, and I saw Dennis get up, my friend Dennis.

Q Is that the gentleman that just testified?

A That's right, uh-huh. Like, you know, he was going to come after him – my friend was going to go after this guy. That's when I saw him running.

THE COURT: The witness gestured toward the Defendant.

THE WITNESS: Yes, sir, the witness.

And so I just assumed that he had been hit with that bottle, and which Dennis said later that he had.

BY MS. ADDISON:

Q Did you have any financial loss or property taken?

A I lost about twenty-two dollars.

MS. ADDISON: Thank you. Answer any questions Mr. Saunders has.

[36] THE COURT: Cross-examination.

MR. SAUNDERS: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. SAUNDERS:

Q Sir, what was your contact with the Defendant on that evening?

A My contact was that he was there when I was robbed.

Q He was there?

A That's right.

Q But your personal contact with him was what?

A Are you saying physically?

Q Yes, sir.

A He had done no physical injury to me.

Q So in response to the Commonwealth's question, that should have been your answer. You were asked what your contact was with him. And you go into this description of what happened to somebody else.

A Oh, I'm sorry, I'm a little bit dubious about what your question is, –

MR. SAUNDERS: I have no further questions.

[37] A – my contact.

THE COURT: All right. Any redirect?

MS. ADDISON: No further questions of this the witness, your Honor.

THE COURT: All right. Any further need for Mr. Hultquist?

MS. ADDISON: No, sir.

MR. SAUNDERS: No.

THE COURT: All right. Thank you. You're free to go. You may leave or you may have a seat in the Courtroom.

Next witness.

MS. ADDISON: Kevin Phillips.

THE CLERK: Kevin Phillips, come into the Courtroom, please.

THE COURT: Has he been sworn?

MR. ROGERS: Yes, he has, sir.

THE COURT: Okay. Have a seat up here, sir.

KEVIN PHILLIPS,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

[38] DIRECT EXAMINATION

BY MS. ADDISON:

Q Would you state your name for the record, please.

A Kevin Phillips.

Q Mr. Phillips, where were you living in June of 1996?

A I was living in Hampton.

Q Hampton. Were you employed at that time?

A Yes.

Q How?

A I was a delivery driver for Chanello's Pizza.

Q Pizza delivery? Directing your attention to June 28 of 1996, were you so employed in Hampton at that time?

A Yes.

Q Were you working on that day?

A Yes.

Q Did you have an encounter on that day with the Defendant in this matter, Daryl Atkins?

A Yes.

[39] Q Would you describe for the jury your encounter with Mr. Atkins.

A I was just getting ready to get off work, and I went to – they asked me to take one more delivery. So I took a delivery to a house on Sacramento. I can't remember the address. And as I approached the house the – I was told not to deliver it if it looked suspicious.

So there was someone standing out front, so I pulled in front of the house and walked up to the house. When I got about twenty feet from the front door, the person at the front door turned his back to me. And at that time I started walking closer to him, and three other people came around the side of the house.

Q Was there anything unusual about their appearance?

A They were all wearing big, black coats, with hoods and, like, masks, or hooded masks.

Q The man standing at the door, was he dressed similarly?

A He had a striped shirt on, long shorts, and no mask.

Q No mask?

A No mask.

Q What happened next?

[40] A At that time, one – two of the people walked straight to the car, and one of them came around me with a gun. At that time he walked around behind me and put the gun up to my head. At that time the person that was standing without the mask came around behind me and started checking my pockets and seeing if I had – just emptying everything I had.

Cars started driving by, and they told me to get down. So they put me on my knees and kept the gun in the back of my head. At that time I was told to crawl to the – to around the bushes to get to my car. And I kept asking over and over again, to make sure I got everything right, so I didn't do something I wasn't supposed to.

At the time they put me in the back of my car. One of the people was already there. And he was in the driver's seat. The person with the gun got into the passenger-side front seat. And then the other two ran.

At that time I was driven about maybe half a mile to this place where there's a swamp. And I was told to get out of the car. And on the way there, there was like a debate on whether or not I was going to be shot or not.

And they were – one was trying to and one was trying not to.

[41] The – I got out of the car, and one of them walked behind me up through this field in between some houses. And at that time I was told to lay on the ground. And I got on the ground, and the gun was put in my back and I was searched again, I guess, to make sure everything was taken. He stood up and he just stood there for a couple of minutes, and then he told me to stand up and walk towards the edge of the swamp.

I got to the edge, and he put the gun – he racked the gun, or loaded it, and put it to the back of my head and stood there for a couple of minutes, and then he said I had five seconds to run. At that time I got into the swamp and I was going through, and once I got to the other side I was told if – if they saw a white hat that they would kill the person that was wearing it.

Q Did you have on a hat?

A I had on my delivery hat. It was a white hat. And at that time I dove under and just started crawling through the bottom of the swamp. And then I heard tires squealing. So at that time I got up and just kept going across.

Q What, if any, financial loss did you have as a result of this?

A I lost my car, hence I lost my job. I couldn't do my job anymore just because of the [42] consequences of it. Insurance, rent, everything, I pretty much lost everything.

MS. ADDISON: Answer any questions Mr. Saunders may have.

CROSS-EXAMINATION

BY MR. SAUNDERS:

Q Good morning, Mr. Phillips.

A Good morning.

Q Now, the incident you just described, how many people were involved?

A Five, including me.

Q All right. And you said that there was one unmasked individual, correct?

A Correct.

Q The other three individuals were fully masked?

A Yes.

Q Have you ever been able to pick out any of those four people?

A Just descriptions.

Q So you were not able to say who was unmasked at the door, correct?

A No.

[43] Q And the individual that you say – kept repeating as he, you're not talking specifically about the Defendant?

A Which he?

Q That's what I'm saying.

A In which instance of the –

Q You kept saying he had gone or he put me in the car.

A Okay.

Q But you're just stating –

A I'm stating he as an individual, not as a person.

Q Not the Defendant?

A Right.

Q All right. Do you recall testifying in Hampton Circuit Court on March 7th, 1997 –

A Yes.

Q – in connection with that incident?

A Yes.

Q Do you recall the description you gave of the individual who had the gun?

A Yes.

Q Would you repeat that description for us.

A The one who had the gun was six foot, [44] six-one, about a hundred and ninety pounds.

Q And do you recall the description of the individual who was unmasked at the front door?

A He was about five-five, five-six, about a hundred sixty-five, a hundred seventy pounds.

MR. SAUNDERS: May I approach for a moment?

THE COURT: Do you need to show him something?

MR. SAUNDERS: Yes, sir.

THE COURT: Give it to the Bailiff, have him point out what you wish him to read.

(A document was handed to the witness by the Bailiff.)

BY MR. SAUNDERS:

Q Could you look at line nineteen to twenty-one, sir.

A Okay.

Q Does that refresh your memory as to the weight of the individual that you were talking about?

A Okay. I was off about ten pounds.

Q More like twenty?

A Oh, twenty.

THE COURT: Would you hand that back to Defense Counsel.

[45] (The document was returned by the Bailiff.)

BY MR. SAUNDERS:

Q Would you tell us what it says as far as what the weight was?

A A hundred and forty to a hundred forty-five.

MR. SAUNDERS: All right. I don't have any further questions, sir.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MS. ADDISON:

Q To your personal knowledge, Mr. Phillips, was Daryl Atkins ever charged with offenses involved in that incident?

A Yes.

Q And you, in fact, testified at the trial?

A Yes.

Q Do you know whether or not he was convicted?

A I believe he was convicted.

MS. ADDISON: Thank you. No further [46] questions.

THE COURT: Recross?

RECROSS-EXAMINATION

BY MR. SAUNDERS:

Q If you were unable to identify anybody, do you have any idea how he was convicted?

A Could you –

Q If you were unable in that trial to say he was the individual who was there, do you have any idea how he got convicted?

A I'm not up on the legal aspects.

MR. SAUNDERS: Nothing further.

THE COURT: Okay. Any further need for Mr. Phillips?

MS. ADDISON: No, sir, I don't believe so.

THE COURT: Thank you for coming, sir. You're free to go or you may remain in the Courtroom.

MS. ADDISON: Commonwealth would call Amanda Hamlin.

THE CLERK: Amanda Hamlin, come into the Courtroom, please.

MS. ADDISON: Ms. Hamlin has been [47] sworn.

THE COURT: Yes, I recall her.

AMANDA HAMLIN,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Good morning, ma'am. Would you state your name, please.

A My name is Amanda Hamlin.

Q Would you spell your last name for the record.

A H-A-M-L-I-N.

Q Thank you. Ms. Hamlin, directing your attention to August 9th of 1996, where did you live on that date?

A 934 Aberdeen Road. And that's in Hampton, Virginia.

Q And approximately eight o'clock in the evening on this date, were you at your home?

[48] A Yes, ma'am.

Q What were you doing, if you recall?

A I was just finishing up cutting my grass.

Q Was there anyone else there with you?

A My daughter was in the house.

Q Did you at that time have an encounter with the Defendant in this matter, Daryl Atkins?

A Yes, ma'am.

Q Describe for the jury, please, what happened in that encounter.

A Okay. I had just finished cutting my grass. And I was backing my lawnmower into the shed. And my head was turned like this as I was backing in (demonstrating). And just as I was coming back around like this (demonstrating), a gun was slapped up beside my head. And there was some dialogue. I can't remember exactly what the dialogue was. But Daryl told me to get off my lawnmower.

Q Did you do that?

A Yes.

Q Did you have any problems doing that?

A My foot had gotten caught in the lawnmower, and he came around and helped me to get my foot out of my lawnmower, yes.

[49] Q What happened next?

A He asked me who was in the house. And I don't remember what I replied. And from that point on, he caught onto my shirt and led me around to the front yard and –

Q Where was the gun at that point, if you know?

A I don't remember. I don't remember. He led me around to the front yard, and we were standing in front of my den window, and he took the gun and he hit me in the head. And I fell to the ground.

Q Were you struggling with him when he did that?

A No, no.

Q And what happened next?

A He picked – he helped me to get up from the ground. And there was some dialogue there, I don't remember what that was either.

And after that he started up the side of my driveway, like he was going to leave. And I started to walking toward my house, but I stopped, because I thought if I ran then he'd shoot me in the back. So he went up beside of the car and around like he was leaving, and then he

came back down towards me. And I was just standing there, just looking at him. And he took the gun [50] and put it to my stomach and just shot me.

Q Were you hospitalized as a result of that gunshot, Ms. Hamlin?

A Yes, ma'am.

Q For how long?

A Twenty-one days.

Q Did you have any other medical treatment as a result?

A Yes, ma'am, I'm seeing a psychiatrist.

Q Did you have any surgery or any other medical procedure?

A After August, I had to go back to the hospital to have – I received a colostomy as a result of the gunshot, and I went back in March of 1997 to have the colostomy removed, and that's it.

Q Do you still have any physical problems as a result of the gunshot?

A No.

Q Did you have any economic loss as a result of this?

A No.

Q Medical bills covered by insurance?

A Not – not all. The victim program helped me for a while, but right now I pay my own psychiatric bills.

[51] MS. ADDISON: Thank you. Answer any questions Mr. Saunders may have.

MR. SAUNDERS: I have no questions.

THE COURT: All right. Ms. Hamlin, thank you so very much for coming. You're free to go or you may remain in the Courtroom.

THE WITNESS: Thank you.

THE COURT: Next witness.

MS. ADDISON: Mark Armitage.

THE CLERK: Mark Armitage, come into the Courtroom, please.

THE COURT: He has been sworn?

MS. ADDISON: He has been sworn, your Honor. I believe he previously testified earlier this week.

THE COURT: All right.

MS. ADDISON: I would remind you, Mr. Armitage, you are still under oath.

THE WITNESS: Yes, ma'am.

MARK ARMITAGE,

recalled as a witness by the Commonwealth, having been previously sworn and testified, was further examined and [52] testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q You stated earlier when you testified in this trial that you knew the victim, Eric Michael Nesbitt?

A Yes.

Q When did you meet Eric?

A He got to Langley in about January of –

THE COURT: Excuse me. May we have your name?

MS. ADDISON: Oh, I'm sorry.

THE WITNESS: Mark Armitage.

THE COURT: Thank you.

BY MS. ADDISON:

Q When did you first meet Eric Nesbitt?

A He got to Langley Air Force Base in about January of '94, I think it was.

Q And what, if any, relationship did you develop with him?

A He became one of my closest friends. We frequently did almost everything together.

[53] Q How often would you see him?

A Every single day, sometimes twice a day, because we worked together and hung around after work.

Q Are you married, Mr. Armitage?

A Yes, ma'am.

Q And was your wife a friend of Eric's as well?

A Probably his closest.

Q. When was the last time you saw Eric alive?

A That day, the day. August 16th, 1996.

Q Where was that?

A At a – saw him at work, and then we had a squadron picnic that day, and we all were there playing games and just squadron camaraderie, everyone hanging around together having a good time.

Q And how is it that you found out that Eric had been killed?

A Detective Lyons and another officer – two other officers came to my apartment the next morning, Saturday morning.

Q What, if any, effect did Eric's murder have on you and your family?

A It hurt really bad. My wife was nine [54] months pregnant and I had to tell her he was dead. I didn't know how he was killed, just they told me he was dead. And they put me out in the hallway. I had to come back in and tell her. He didn't deserve it.

Q What, if any, effect did Eric's murder have on your wife, Mr. Armitage?

A She didn't stop crying for four days. And I had to hold her. She gave birth four days later. Eric was supposed to be my son's godfather.

MS. ADDISON: Thank you, Mr. Armitage. Answer any questions Mr. Saunders may have.

THE COURT: You may cross-examine.

MR. SAUNDERS: I have no questions.

THE COURT: All right. Thank you, Mr. Armitage. You are free to go or you may remain in the Courtroom.

THE WITNESS: Thank you.

THE COURT: Next witness, please.

MS. ADDISON: Mary Sloan.

THE CLERK: Mary Sloan, come into the Courtroom, please.

MARY SLOAN,

[55] recalled as a witness by the Commonwealth, having been previously sworn and testified, was further examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Would you state your name, please.

A Mary Sloan.

Q Mrs. Sloan, you have previously been sworn and testified in this matter, is that correct?

A Yes.

Q And you testified before that you are the mother of Eric Nesbitt?

A Yes.

Q What was Eric's date of birth?

A February 10th, 1975.

Q Do you have other children, Ms. Sloan?

A Yes, I have five other children.

Q What are their names and ages?

A Marshall is nineteen. Julie is seventeen. Brenda is twelve. Tim is eight. And Nathan is six.

Q So Eric was the oldest?

A Yes.

[56] MS. ADDISON: I'd ask that that be marked. I don't believe it has been, your Honor.

THE COURT: Commonwealth's Exhibit 70.

(Commonwealth's Exhibit Number 70
was marked for identification.)

MS. ADDISON: I'm going to ask the Bailiff, Ms. Sloan, to hand you a photograph as soon as it's marked.

(A photograph was handed to the
witness by the Bailiff.)

BY MS. ADDISON:

Q Do you recognize that photograph?

A That's myself and my children at a family reunion a couple of years ago. It's Eric, Julie, Marshall, Brenda, and Tim.

Q Which one is Eric in that photograph?

A He's the tall, red-headed one. Apparently he made us all laugh, saying something there.

Q You described when you testified before about some of the things that Eric did in high school and as he was growing up. Do you recall that?

A Yes.

Q What were some of his interests and activities?

A He liked sports. And he played on [57] basketball and ran track at his school. He was in the Boy Scouts for a number of years, long enough to became an Eagle Scout. He liked camping, hiking, fishing. He was in a Christian youth organization in town. And –

Q For the benefit of the jurors that may not know, Ms. Sloan, describe what was involved in becoming an Eagle Scout?

A It's the highest rank that a boy can reach in scouting. And it takes a lot. As you go through scouting, at each level you have to do a service project and do all kinds of I guess you call them achievements, and starting right out from the Cub Scouts. And the boys in Boy Scouting have to take a lot of responsibility. They lead the

pack and they take leadership positions, and something that Eric took right to.

And to became a Eagle Scout you have to get twenty-one – twenty merit badges, which involved quite a lot of work, doing a lot – a number of different activities, and have to do a service project which involves something that you do for the community or an organization.

Q I'm going to hand you another photograph, Mrs. Sloan and ask if you –

THE COURT: Marked Commonwealth's Exhibit Number 71.

[58] (Commonwealth's Exhibit Number 71 was marked for identification.)

BY MS. ADDISON:

Q Seventy-one. Do you recognize that photograph?

A Yes, that's Eric when he receive his Eagle Scout award at our church in I believe it was June of '93. They say only two percent of boys that go into scouting achieve the Eagle Scout Award. So it's difficult to do.

Q What were the community activities that Eric did that earned him the Eagle Scout rank?

A I think the one – the final project he did, he had to organize and do the – have the troop paint the inside of the Masonic Lodge where the Scouts were holding their meetings. It involved making sure the materials were obtained and organizing it, making sure that everyone came to work and cleaned up afterwards. And there was a lot involved.

Q Did he have any involvement with the fire department and rescue squad?

A Yes, he became an Explorer Scout, which was affiliated with the rescue squad in Gilbertsville, and he became an emergency first responder, took the training for that. And then when he became [59] eighteen, he was eligible to join the volunteer fire department, so he joined that so he could go on all the rescue calls.

Q I'm going to hand you one last photograph that would be Commonwealth's Exhibit 72?

THE COURT: Seventy-two.

(Commonwealth's Exhibit Number 72 was marked for identification.)

BY MS. ADDISON:

Q Ask if you recognize that photograph?

A This is Eric with his Explorer Troop in front of the Gilbertsville ambulance. Eric was instrumental in forming that Explorer Troop. They never had one before in Gilbertsville. He kind of pulled everybody together and did it because it was something he felt was necessary for the community.

Q When did he join the Air Force, Ms. Sloan?

A In August of '93, two months after he graduated from high school.

Q Prior to that, had he been employed ever?

A Yes, for about two-and-a-half to three years in high school, he worked at our neighbor's dairy farm, helping with chores for a few hours each week. And [60]

in the time after he graduated from high school and when he was waiting to go into the Air Force, he worked doing hay for a local farmer who did hay.

Q After he went in the Air Force about how often did you get to see Eric?

A He was able to come up about four times a year, I guess.

Q And when was the last time that you saw him?

A Two weeks before he died he came up for a family reunion.

Q Did you, during that visit or others, have an opportunity to talk with Eric about his future plans?

A Yes, he was getting to the point in the Air Force where it was kind of decided if he was going to stay with it or what, and he kind of hinted that he would like to stay with the Air Force, he liked it, seemed like a good thing for him to do.

Q How was it that you were notified of Eric's murder?

A When someone dies in the military, they send out something called a Death Notification Committee. A couple of members of the military come right to your house and tell you.

[61] Q Is that how you were notified?

A Yes.

Q I know it's very difficult to do, but, if you can, describe for the jury the effect of Eric's murder on you and your family.

A It's just total shock. It's not something you would ever expect. You just can't believe that something so terrible would happen to someone that you know and love. And it's been just terrible.

Q What about Eric's brothers and sisters, what kind of impact has it had on them?

A It's kind of hard for me to describe, because they are children, and children really don't have any basis for dealing with something like this. It's not something they expect in their lives.

I think probably the hardest effect has been on Julie, my 17-year-old daughter, because she was quite close to Eric, and she is a little bit older and she understands some of it. And it's hard for them to even talk about it, because it's not – you don't know how to deal with it. I know she has lost a lot of weight since he died. And she has became kind of, I guess, fatalistic, you could say. She doesn't really – I don't think she thinks life can really have good things in it like it could have had because you just never know [62] what's going to happen.

And Brenda has taken it really hard because their birthdays were a day apart, and Eric was always kind of the special big brother for her. He always made an effort to send her a birthday card or a special present or something. And they were always kind of kidding back and forth and everything. And she has became quite defensive about things that have to do with Eric now, looking after him like maybe he's going to come back or something. I don't know.

Q And have your children, your remaining children, been here with you this week?

A Yes.

Q All of them?

A Uh-huh. It's been hard for them, I know. But it's their big brother and something they wanted to do.

Q Your oldest remaining son, was he able to be here this week?

A No, he's – he's in the Army and he just graduated from basic training Thursday, so he couldn't be here.

Q Where is he stationed?

A Pardon?

Q Where is he stationed?

[63] A In Fort Benning, Georgia.

MS. ADDISON: Thank you, Ms. Sloan. Answer any questions that Mr. Saunders may have.

THE COURT: Mr. Saunders, do you wish to examine this witness?

MR. SAUNDERS: I have no questions, other than to express my personal sympathy to the family.

THE WITNESS: Thank you.

THE COURT: Thank you, Ms. Sloan. You may have a seat in the Courtroom.

Next witness.

MS. ADDISON: Your Honor, the Commonwealth would move to introduce certified copies of prior convictions.

THE COURT: Do you want those photographs entered?

MS. ADDISON: Yes, sir, I would move to introduce the photographs at this time, please.

THE COURT: Any objection to the photographs coming in?

MR. SAUNDERS: No objection.

THE COURT: All right. We'll mark, then, previously marked Commonwealth's Exhibits 70, 71 and 72, make them filed and a part of the evidence in this case.

[Admission Of Exhibits]

[64] And your next motion, ma'am?

(Commonwealth's Exhibits Number 70, 71 and 72 were received in evidence.)

MS. ADDISON: Move to introduce the certified copies of prior convictions. Your Honor, the documents are individual but there's no reason they can't be one exhibit.

THE COURT: That's fine. Any objection to having them a singular exhibit, Mr. Saunders?

MR. SAUNDERS: No, sir.

THE COURT: All right. Make that 73. You've seen them, Mr. Saunders.

MR. SAUNDERS: Yes, sir, I have reviewed these. I have no objection to these.

THE COURT: All right. Mark those as Commonwealth's Exhibit Number 73, the prior convictions, and mark them filed, make them part of the evidence in this case.

MS. ADDISON: Thank you, your Honor.

(Commonwealth's Exhibit Number 73 was received in evidence.)

MS. ADDISON: No more witnesses, your Honor.

THE COURT: All right. Commonwealth

* * *

[Argument To Judge]

[70] background of the Defendant and other facts in mitigation of the offense. Then it goes on to define those six matters which may be considered in mitigation.

Subsection C of the same Code Section: The penalty of death shall not be imposed unless Commonwealth shall prove beyond a reasonable doubt that there is a probability, based upon evidence, of the prior history of the Defendant, or of the circumstances surrounding the commission of the offense of which he is accused, that he would commit criminal acts of violence that would constitute a continuing serious threat to society. That is – has been proved. There is evidence to that extent, the continuing future dangerousness. That's how it's characterized, called future dangerousness.

MR. SAUNDERS: Yes, sir.

THE COURT: Comma, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim. The Court reads that section as requiring some evidence as to the second factor.

Yes, sir.

MR. HAHN: Judge, if that's the Court's ruling, the Commonwealth would respectfully move [71] the Court to open – to allow the Commonwealth to reopen the case. I have case law that says that is clearly in the Court's discretion in the interests of justice.

THE COURT: You don't have to go into that. The Court is well aware of the Court's discretion relative to reopening. That's not an issue. The Court has that power and within the sound discretion of the Court, finding that there is no prejudice at this stage to the Defendant, that there would be prejudice to the Commonwealth if it were not allowed to reopen, the Court will permit the Commonwealth to reopen the case relative to the outrageously or wantonly vile, horrible or inhuman treatment, which involves the commission of the offense.

Now, which witness would you be calling to do that?

MR. HAHN: Your Honor, we move to introduce all the evidence previously admitted and the capital jury finding, which was rendered by the jury and is an official judicial record of the Commonwealth of Virginia and a

record of this Court and can come into evidence based on its own authenticity.

THE COURT: Mr. Saunders.

MR. SAUNDERS: I object, your Honor.

THE COURT: You are objecting to what, now?

[72] MR. SAUNDERS: The objection is to, number one, there is no foundation in this proceeding for the introduction of all of the exhibits from the prior proceeding.

There is – the autopsy report is hearsay. Doctor Bush would have to testify. She's not here to testify. The pictures from the autopsy have not been authenticated in this proceeding and, therefore, I object to the opening of the introduction of all of these things without a proper foundation, and also based on the medical examiners not being here to testify. There is no witness to authenticate any of this.

THE COURT: Do you have any objection to the Court's discretion in reopening?

MR. SAUNDERS: Well, I will note my exception to the Court's reopening. The Commonwealth had fully rested and they had represented to this Court that that was their case. And I recognize the Court's discretion, but note our exception.

THE COURT: All right. Now, based on your argument that there is no foundation, the Court finds that the records before the Court, the exhibits before the Court are before the Court with absolutely proper foundation. They are a record on the evidence of this proceeding, and

I would find that a foundation has been [73] previously provided. They are now the official records of this proceeding.

MR. SAUNDERS: You will note our exception to that ruling, Judge.

THE COURT: Did you wish to add to the rationale of the Court, Mr. Hahn?

MR. HAHN: If I might just have a moment, Judge. Obviously, from everything we can learn, there is no foundation – or this is first impression, so if you will just give me a moment to reflect.

THE COURT: Surely.

(The attorneys for the Commonwealth conferred.)

MR. HAHN: Your Honor, we believe the record in the sentencing or in the guilt phase is sufficient to rest upon, and we would ask that it all be introduced into evidence as well as the finding of guilt by the jury of capital murder.

THE COURT: Well, I don't know that that part is necessary. That's been done. That doesn't have to be done here. The finding of guilt is not at issue here. That's not the issue. The issue is outrageously wanton, vile or inhuman treatment.

MR. HAHN: Then we would move for the introduction of all the exhibits and the evidence [74] presented in testimony.

THE COURT: Now, you think about – you have – I want the Commonwealth again to think about what you're asking the Court to do. Because you have – there

are two triggering devices for the death penalty. Two triggering devices, future dangerousness, which you have put on evidence to that. All right. That's number one. And the outrageously wanton or vile conduct is number two. The jury does not have to find on both. All right? They do not have to find on both.

MR. HAHN: They can find either or, or both.

THE COURT: That is correct. Now, to again, asking you to consider this for your – for your review factor, the Court is comfortable with the position that the evidence that the Court has received has been received with proper foundation. It becomes a part of this proceeding. The exhibits – excuse me, the exhibits that are received have been presented with the proper foundation and do not have to be re – foundation does not have to be testified to again in this proceeding. I'm pretty comfortable with that. But I don't know if there is a case on this.

MR. HAHN: If Mr. Saunders would enlighten us, perhaps we could all know if there is a case [75] on this point.

MS. ADDISON: Your Honor, I have never seen anything that requires reintroduction of evidence from the guilt phase-regarding vileness. And we're not talking about just the exhibits but all evidence from the guilt phase, the jury necessarily has access to that.

As I said earlier, there's a case, Watkins, that talks about whether or not there is a need for a new, separate jury, and in discussing that issue, one of the statements is that that new jury would necessarily obviously have

access to all of the evidence from the guilt phase of the trial.

This is no – there is nothing additionally different about this than any other bifurcated trial. The evidence from the guilt phase need not be reintroduced or we would be here another week.

MR. ROGERS: It is difficult.

THE COURT: I'm not having any difficulty with that position. I'm going to ask you to narrow your focus and your thought process to the single thing of the outrageousness of the conduct itself, limited to, in the Court's vision of the matter, a few seconds or minutes of this transaction, which is during the time of the actual killing, okay?

Now, you have apparently two [76] witnesses, Doctor Bush, who has testified to the conditions of the body, and whoever observed that body with the casings and all that around. That would be Investigator Lyons or whomever was the lead person.

I would not permit Investigator Lyons to testify today because he's been in the Courtroom subsequent to his separation. When you rested, he has been in the Courtroom. I don't know whether he is in the Courtroom now or not, but I have seen him in the Courtroom.

MR. ROGERS: He is, for matters of the record, your Honor.

THE COURT: All right. Now, so he would not be permitted to testify. But the Court's view of this is that the outrageousness of it is what happened at the actual crime of capital murder. We've got the robbery. We've got

the abduction. That's admitted. The triggering one – two triggering devices for capital.

Now we're talking about what the aggravated battery of the victim and the aggravated battery is simply the condition of the body. Is that a fair statement?

MS. ADDISON: Yes, sir, it's shown by the autopsy –

THE COURT: Right.

[77] MS. ADDISON: – the photographs of the bullet wounds to the victim, the testimony regarding how that occurred.

THE COURT: I understand. I understand, okay? And that does not mean that you have to go back through and prove the entirety of the case.

MS. ADDISON: Is it the Court's position that that testimony needs to be reheard in this case?

THE COURT: I did not say that to you, ma'am. I said that I want you – your argument to the Court is that you'd have to try it for a week, you see. The – and I'm saying to you that you do not have to try it for a week. One witness who could identify the condition of the body in two or three minutes would be the person that would be able to show the aggravated battery to the victim.

MS. ADDISON: Your Honor, additionally I believe that we would need another witness to testify regarding what we view is a form of torture in the length of time of this entire offense.

THE COURT: And that would be Jones.

MS. ADDISON: That would be Mr. Jones. Or reintroduce the evidence from the guilt phase that's already part of the Court's record.

[78] THE COURT: You've got one of the triggering devices for death, okay? I mean, you've introduced evidence as to future dangerousness. I'm merely – and again, Mr. Hahn, –

MR. HAHN: I understand, your Honor.

THE COURT: – merely asking you to consider your position on review. I have ruled that I'm going to reopen. In the sound discretion of the Court, I'm going to let you reopen, if you wish. I have ruled that if you want to reopen that I would find that proper foundation has been laid for the introduction of the exhibits in the trial of this matter and they are part of the record of this Court, therefore – and the jury obviously has already seen them and considered them – therefore, I would allow you to argue the vileness factor based upon those exhibits.

MR. HAHN: Yes, sir.

THE COURT: The question I'm asking the Commonwealth at this point is: Do you want to do that?

MR. HAHN: Well, what I would ask, as an additional motion, since the Court seems – and I understand fully the Court's position. In an overabundance of caution and to some degree the Commonwealth feels that it may be tilting at windmills [79] here, just as an overabundance of caution, given the seriousness of this case, your Honor, I'd ask for a continuance for an hour-and-a-half so we can get these witnesses here today.

THE COURT: Denied.

MR. HAHN: We would move, your Honor, to introduce the autopsy of Doctor Leah Bush.

THE COURT: Already been admitted.

MR. HAHN: Then I understand the Court's ruling is all of those – all of the evidence in the guilt phase is admitted or will be admitted?

THE COURT: Yes.

MR. HAHN: And, your Honor, since you don't – the Court is not inclined to give an hour-and-a-half recess, I would ask the Court to give such time as would allow William Jones be transported from the Regional Jail here. That should be only a matter of twenty minutes or so. Certainly the seriousness of the case and the issue at hand would merit that, your Honor.

THE COURT: Think about what William Jones said, as to what that evidence is. Think about it.

MR. HAHN: Let me try one more time, Judge, maybe the third will be –

THE COURT: I haven't denied that motion yet, you understand.

[80] MR. HAHN: I understand, I understand. As we talked about the lyrics, as the trial is flowing, I'm trying to meet the changing circumstances. Would the Court allow the Commonwealth a brief, ten-minute recess to collect our thoughts on this matter, come back and tell you exactly what we would like to do, now that we have the Court's ruling on the Defense objection?

THE COURT: I'll grant that.

MR. HAHN: Thank you, your Honor.

THE COURT: Court will be in recess for ten minutes.

(The Court recessed, after which the Court reconvened.)

(The Defendant was present with his counsel following the recess.)

THE COURT: Mrs. [sic] Addison.

MS. ADDISON: Your Honor, I guess at this point I would ask the Court to clarify where its ruling is at this point. I understand the Court has granted our motion to reopen.

THE COURT: That's correct.

MS. ADDISON: The Court has said that the exhibits from the guilt phase of this proceeding were admitted with proper foundation and are admitted in this [81] proceeding, is that correct?

THE COURT: If you wish to pursue that on the – on the triggering device of vileness and outrageous conduct.

MS. ADDISON: That's correct. What I'm asking the Court for clarification purposes is, is it the Court's ruling that testimony – evidence through testimony from the guilt phase of the trial regarding those exhibits can be argued by counsel in this proceeding, or is the Court going to instruct the jury that they are to disregard that testimony in this proceeding?

THE COURT: Do you wish to be heard on that? She's asking for a clarification.

MR. SAUNDERS: Of the Court's position?

THE COURT: Yes. Do you wish to be heard?

MR. SAUNDERS: I'll wait until I hear what the Court's position is on it. Thank you.

THE COURT: Okay, sir. The argument for imposition of the death penalty, at this stage, there is evidence before the jury on future dangerousness. If you decide that you wish to proceed on the secondary, or the second issue that could trigger the death penalty, [82] which is outrageous conduct, the vileness, the exhibits which you have previously introduced can be argued.

MS. ADDISON: Can be?

THE COURT: Argued before the jury.

MS. ADDISON: The exhibits?

THE COURT: Yes. That's what I'm suggesting that you do, is limit your argument to the exhibits that have been introduced. The testimony which has been introduced was not reintroduced at this proceeding, the testimony, the verbal words.

MS. ADDISON: Yes, sir.

THE COURT: Okay. So in that – in that finite definition, I think if you have an exhibit you wish to produce that shows the second factor of vileness –

MS. ADDISON: Yes, sir.

THE COURT: – and I think there are at least two –

MS. ADDISON: Yes, sir, or more.

THE COURT: – or more, the photographs, there are charts, there are autopsy reports, et cetera, –

MS. ADDISON: Yes, sir.

THE COURT: – those exhibits have been, with proper foundation, previously admitted and are [83] a part of this record.

MS. ADDISON: And are admitted for this phase.

THE COURT: And would allow you to admit those in this proceeding because proper foundation has been previously presented and that would be a redundancy unnecessary at this proceeding.

MS. ADDISON: Yes, sir.

THE COURT: Does that clarify you?

MS. ADDISON: Yes, sir. And we would ask that those exhibits be admitted.

THE COURT: I have given you the chance to think about whether you wish to argue both of the triggering elements or just one.

MS. ADDISON: Your Honor, we wish to argue both.

THE COURT: All right.

MR. HAHN: Let me – the Court's comment on that raises an issue that we haven't gotten to the jury finding form yet. I have attempted to present it to Mr. Saunders and he doesn't like ours, so we'll have to come to that at some point. Maybe this is a good time to take

that up. It's our – the Commonwealth's understanding is we can argue that the jury can find future dangerousness and vileness, to use shorthand, or we [84] can say you can find he's not future dangerous but he's vile and deserves the death penalty, or you can find that he's future dangerous but not vile and still give him the death penalty.

THE COURT: The latter example is where you currently are. The singular triggering device for death penalty for future dangerousness, which you have presented evidence on –

MR. HAHN: Agreed.

THE COURT: – and if you stay there and choose not to reopen, notwithstanding the Court's permitting you to do that, –

MR. HAHN: I understand.

THE COURT: – then we would – the finding form would be reduced strictly to the future dangerousness or death or life and not including the vileness factor.

MR. SAUNDERS: Correct, your Honor.

THE COURT: And that's simply – I mean, simply put.

MR. HAHN: Okay. But what I want to clarify is if we do reopen, the Commonwealth reopens, all the exhibits from the guilt phase are introduced into evidence and accepted.

THE COURT: Yes, with proper [85] foundation at the guilt phase.

MR. HAHN: Then we'll have a capital murder finding that will be – there will be four sections to it. One, that –

MR. SAUNDERS: Your Honor, I think we're arguing the finding form at this point in time, which is not an issue at this point in time. I do have a major objection to take up at the appropriate time.

MR. HAHN: Well, why not take it up now?

THE COURT: He's just asking about – not the wording of the finding form but the – what would be in it.

MR. SAUNDERS: Actually, I think he is asking about the wording, because that's the impression I got, Judge.

MR. HAHN: Well, if we have to address that issue, why not do it now? I mean, we have exchanged with counsel and counsel doesn't seem to like it, so let's decide it right now, Judge.

THE COURT: I won't be able to decide until I hear all the evidence, number one, okay?

MR. HAHN: As to whether the form is right?

THE COURT: That's correct. The – in [86] general, without addressing the specifics of the finding form, the Commonwealth currently stands with the conviction of capital murder and evidence at the sentencing phase of future dangerousness.

MR. HAHN: Yes, sir.

THE COURT: If you stay here, if you do not go any further, that's where we are. We've got future dangerousness for the death penalty or life.

MR. HAHN: Yes, sir. I understand.

THE COURT: If you choose to reopen, and I've given you permission to reopen in the sound discretion of this Court, and when you reopen, you introduce – you reintroduce or ask that – you move that those exhibits previously filed be lodged in the vile stage of the triggering device for the death penalty, which the Court has said it would do.

Then you're at future dangerousness and vileness, future dangerousness or vileness, vileness alone, vileness or future dangerousness. Just the reverse.

MR. HAHN: Okay.

THE COURT: That's the perception of where the Court sees you. And those factors can also be life. They don't necessarily trigger death.

MR. HAHN: Agreed. Thank you for that [87] clarification.

MR. SAUNDERS: That's a fair statement of what the situation – the law is, Judge.

THE COURT: Okay. Thank you.

MR. HAHN: And one final clarification, Judge. Is it the Court's position that none of the testimony from the guilt phase comes into this stage?

THE COURT: That was a question Ms. Addison asked me to clarify. And since there is no verbal testimony presented at this proceeding, the only evidence that you would have to argue for vileness would be, in fact, your exhibits, the photographs, the charts or whatever else it is that are in the sixty-nine exhibits that were presented on behalf of the "Defense," and we would – that's where you are.

MR. HAHN: If I might just have a moment, your Honor.

THE COURT: Yes, sir.

(The attorneys for the Commonwealth conferred.)

MR. HAHN: Your Honor, we'd ask that the Commonwealth be allowed to reopen its case in chief in this part of the proceeding and that all the exhibits previously marked and introduced into evidence in the [88] guilt phase be admitted into this proceeding and would ask that for the sake of this motion and the record, would ask that the Court also rule that the testimony from the previous case – or the previous guilt phase of this case be deemed a part of this particular proceeding in order that the Commonwealth and the Defense can comment upon it to the jury.

THE COURT: You've gotten a favorable ruling on two parts.

MR. HAHN: I thought I might not get it all.

THE COURT: And there is objection by the Defense on all three of your requests.

MR. HAHN: Yes, sir. I understand the exhibits will come in and be admitted.

THE COURT: That's correct. And I have not ruled on – I have told you in a clarification mode where the Court was with arguing the verbal testimony of the guilt phase.

MR. HAHN: Yes, sir.

THE COURT: Do you understand the rationale?

MR. HAHN: Yes, sir, I understand it. I'm just, as the Defense often has to do, you have to make a motion. And I fully understand the Court's decision.

[89] THE COURT: This is the most responsibility that any Circuit Court Judge has in the Commonwealth of Virginia, bar none, okay? Agreed?

MR. HAHN: I would agree wholeheartedly, your Honor.

THE COURT: It's also a responsibility that falls on the Commonwealth.

MR. HAHN: Yes, sir.

THE COURT: That's why the Court has been compassionate with the ongoing trial of both Defense and the Commonwealth. But when the Commonwealth asks for something, you are risking, on review, remand.

MR. HAHN: I understand. That's why the Court is only going to give us two of the three requests.

THE COURT: Well, I feel fairly comfortable with the evidentiary part relative to the exhibits on the

argument of Defense foundation purposes, I think that's redundant and unnecessary. So I have ruled that it may come in, the exhibits may come in. I don't think it's appropriate because there is no verbal testimony in this proceeding for which you to argue.

MR. HAHN: Yes, sir.

THE COURT: So I want you to understand the thought process that goes through this [90] decision making.

MR. HAHN: Yes, sir, your Honor.

THE COURT: So I'm going to deny that.

MR. HAHN: Yes, sir.

THE COURT: Are you ready? Okay. Bring the jury in.

And note the exception of the Defense to all the Court's rulings.

MR. SAUNDERS: Yes, sir.

MR. HAHN: Do we need to renumber all of the exhibits in this proceeding?

THE COURT: No, sir, procedurally you move to reopen, I'll grant your motion to reopen. You're going to move for the introduction of the exhibits, I'll grant that, and then you rest.

THE CLERK: Will the jury come into the Courtroom, please.

THE COURT: Mr. Saunders, planningwise, we're now at eleven o'clock, I'm going to go to one, if you need it or a little longer, before we break on afternoon.

MR. SAUNDERS: I understand, Judge.

(The jury returned to the Courtroom and resumed their seats in the jury box.)

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[93] Doctor Evan Stuart Nelson

Q And, Doctor Nelson, can you give us some information as to your education?

A I'm a Ph.D., in clinical psychology. I received my degree from the University of North Carolina at Chapel Hill. Did my internship at the Indiana University School of Medicine, and a postdoctoral residency specifically in forensic psychology here in Virginia at the Forensic Unit at Central State Hospital.

MS. ADDISON: Your Honor, I believe there is a stipulation regarding Doctor Nelson's expertise.

THE COURT: All right. Do you wish to inquire further, or may I go by the stipulation?

MR. SAUNDERS: You may go forward, your Honor.

THE COURT: By reason of a stipulation previously entered by this Court between the Commonwealth Attorney and the Defense Attorney, by and for the Commonwealth and the Defendant, they have agreed to stipulate the qualifications necessary to qualify Doctor Nelson as an expert in the field of clinical psychology. And that

means, again, ladies and gentlemen, that he may offer opinions relative to his field of expertise.

Thank you, sir.

MR. SAUNDERS: Thank you, your Honor.

* * *

[95] knowing that there could be many different sides to the same story.

Q All right, sir. And have you testified in other capital cases?

A Many times.

Q And have you testified strictly for the Defense?

A No.

Q Have you testified also for the Commonwealth?

A At this time, I think I've been appointed by the Court in forty-six different capital murder cases throughout Virginia and thirteen or fourteen of those were for the Commonwealth; that is, after a first opinion the Commonwealth may want to have a second opinion. I've also done first opinions for Defense experts as well.

Q All right. Now, did you conduct an examination of Daryl Atkins in this particular case?

A Yes, I evaluated the Defendant. That, of course, meant looking at other things besides what he had to tell me.

Q What other things did you look at?

A I was able to look at his school records, some of the Court records related to his prior [96] offenses. I was

able to talk to the family members. I was able to look at information related to the current offense, statements by the Defendant and the Co-Defendant, information from investigative reports. I was able to give him a psychological test that I felt was relevant, was able to talk with the deputies at the jail to find out about his functioning at the jail, as well.

Q You said you gave him psychological tests?

A Yes.

Q What tests did you give him?

A I gave Daryl something known as the WAIS-III, W-A-I-S dash Roman numeral three, it stands for Wechsler Adult Intelligence Scale. It's the standard IQ test for adults here in the United States.

Q And did you find that Daryl had – excuse me, did you find Daryl had any mental illness or defect?

A Yes, based on that test and other information, his full scale IQ score was 59. That means that he falls in the range of being mildly mentally retarded.

Q You prepared certain exhibits I think to help the jury go along?

A Sure. It may help to understand what

* * *

[99] separate the two. Obviously, the more education you have the more you practice using your mind. Just like you build up muscles, you can build up your mind.

An IQ test is in this case about an hour-and-a-half procedure of various tests that the person is asked to do.

And we give this to a large number of people. And based on the average score, we say that is an average IQ. And we set that score equal to 100. And then through some mathematical tricks, we create a range of scores for people where higher scores represent increasing intellect and lower scores represent less intelligence. So, for example, an IQ below 70 overall is considered likely to be mentally retarded, whereas people who are above about a hundred and 30 or a hundred and 40 are approaching the range of brilliance.

These tests are very carefully developed because there are many decisions made about them with regard to placement services, disability monies, et cetera. And there need to be a lot of standards about how we give them so that two clinicians could give them and get essentially the same results, within a point or two. This particular test is the newest version of it. It was just redeveloped in 1995, was given to almost twenty-five hundred adults here in the United States.

The composition of people who take [100] this test is carefully made up to match the U. S. Census overall. It wouldn't make sense to say 100 is the average IQ if all we ever gave it to were white middle class Americans, or all you ever gave it to were inner city minority students. There's also an additional sample of African Americans within this particular test because of the recognition that there may be cultural issues that contribute to why some people from different races and class backgrounds may get different IQ scores.

This particular test measures a range from 45 to 155. There are other tests for other things, but that's why this

is the standard. It covers the vast majority of people who would need to take an IQ test. There are standard rules for administering each part of the test. These rules are laid out in a very thick manual that tells you precisely how to lay down the stimulus cards, the pictures that somebody might be dealing with, what order to put them in. The precise time limits for the amount of time that an individual has to solve a given problem and get an answer. These rules are called standardization. And that's exactly what I'm talking about, the need to be sure that when you give this test by different people that you'll come up with the same score, plus or minus a few points. That's known as the standard

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[105] THE COURT: Before you begin, again, this is entitled, this Defense 7, is entitled, Examples of IQ Test Items.

MR. SAUNDERS: Yes, sir.

THE COURT: Next chart – or next question.

BY MR. SAUNDERS:

Q Doctor, is it possible to fake the results of an IQ test?

A Yes and no. It's impossible to fake a higher IQ because this isn't a case where guessing can help you. Because after a certain number of failed items we start, and because as you can see you have to know answers. It gets pretty heck darn hard to fake a higher score. You might add a point or two more by guessing here and there.

Can people fake a lower score? Certainly. And there are a number of things that we look at to try and determine whether or not somebody has faked a lower score in an effort to look dumb.

Q As that answer applies to Daryl Atkins, how could you – could you tell whether he was faking or not?

A I could tell that he was not faking.

Q And how could you do that?

[106] A Well, there are a number of things. Again, this is a multi-part process. You don't rely on one piece of information.

First of all, you can't fake these performance questions. The bottom line is unless you know the test, you don't know at which point to start faking dumb, because you have no idea how many questions somebody else who is normal or dumb or mentally retarded or brilliant would actually get right or wrong. You may be able to take some guesses about the verbal questions, some easy questions like what are the colors of the American flag. You can pretty much guess that most people are going to get that.

So when people are faking, a couple of things happen. Number one is they have no idea when to start pretending that they don't know answers and, number two, because they don't know that, their scores on the 13 different subtests that make up this IQ are no longer even. Ideally, people's minds are evenly developed across their abilities to do different types of reasoning and logic and memory. So when you start to see someone's scores be scattered all over, you would have concerns.

And in the case of Daryl Atkins, there wasn't that type of scatter.

Q Is there anything in the information [107] that you attained in preparation for this test about Daryl Atkins' background that would lead you also not to think he had faked it?

A Oh, there is a great deal. If I could just follow up with one more thing on that, I think it might be clearer.

I'm putting up – this is marked as Defense Exhibit 12. It's entitled Daryl Atkins – IQ Data.

These are Daryl Atkins' scores on the verbal scales and the performance scales and they are charted out. The reason this goes from one to 19 over here on the left axis is that people can get scores on each one of these tests from one to 19. But what I was saying about malingerers – that is, people who are faking their scores – is that they don't know when to start saying, I don't know the answer to that. So what you get is extremely uneven patterns of scores because some of their scores come up closer to ten, which is an average score, and some of their scores are rock bottom at one, because they started to say, I don't know, much too soon.

You can see his scores are relatively even. And, in fact, there are statistical tests we apply to see if any of the scores are different from each other. And the only score that is different from anything else is his score on this particular single scale from this [108] particular scale (indicating), and I'm pointing to the difference between PA and DS. The details of the scales don't really matter, but that is not an overall pattern of scatter.

His full scale IQ is 59. Compared to the population at large, that means less than one percentile. So to distill that, one of the simplest things, if there is a hundred people here in the Courtroom, the odds are less than one person has an IQ of 59 or below.

Mental retardation is a relatively rare thing. It's about one percent of the population.

Q Doctor, on that chart that you've just got there, under your verbal scores you show a 64 and under the performance score you show a 60. How does that relate to the full scale IQ score?

A Well, the verbal scales are the tests that involve more academic types of things, and the performance scales are the ones that involve more mental reasoning, like the matrices. When this test is developed they first score those sets of items independently and that's what gives us these scores of 64 and 60.

The reason is that as the difference between the verbal IQ score and the performance IQ score grows, say, 15 or 20 points of difference, we can start to [109] look for things like learning disabilities or brain damage or certain types of tumors that can be affecting the way people are reasoning and thinking. So we have to have those.

But the full scale IQ score is not a simple mathematical average between 64 and 60. It's actually putting all of the items back in together, charting out a graph of the scores and then figuring out where people stand. And you can actually have IQ scores that are a few points higher or lower than the real average of these, simply

because people don't necessarily score evenly across various scores. Some people, who are not as bright, may actually score very well on one or two subtests and that skews the nature of information. It's not a perfect circle. There's lots of bumps and ridges.

Q In relation to – to explain that, you said you could indicate whether they had brain damage or anything along those lines. Did you find any evidence of that in this particular case?

A No, there's no evidence of brain damage here. Some portion of people who are mentally retarded likely have some mild brain damage. That explains why they have became retarded. But that's only one piece.

From his scores, there's no reason to [110] be concerned that brain damage is a primary issue for Daryl Atkins whatsoever.

Q Let's go back to the question I asked before you put that chart up. Is there anything in the information that you have reviewed that also led you to believe that Mr. Atkins was not faking this?

A Right. Clearly, if he has a 59 IQ, it should not come out of nowhere. There should be indications prior to this that he has been of limited intellect throughout his life. If that is not the case, then the wool has been pulled over my eyes, or there is something else going on to explain the low IQ.

I was able to review all of his academic records from the school system short of one year, where he was at a different school. And I was also able to look at a variety

of Court records that made reference to his limited intellect as well.

Q Did you prepare a chart on that?

A Yes, I did.

Q But prior to – Doctor, before you put that chart up, the information you're talking about now, his school records and all of that, in your report, did you share that with the Commonwealth Attorney?

A The report and the records are all given back to the Defense Attorney under this statute. [111] Once they decide that they would like me, if they want me to testify at this phase of the case, then all of that is handed over to the Commonwealth's Attorney. And I did have an opportunity to talk with Ms. Addison about what the opinions were in the report.

Q All right. Proceed with the chart.

THE COURT: Identify the number on that, sir – Doctor.

THE WITNESS: This is chart Number 8, Defense Exhibit Number 8, it's entitled Summary of School History. This is culled from going through Daryl's academic records, which are about an inch-and-a-half or two inches thick. Because he was in the same school system throughout his life, except for one year, we were able to get a complete set of records. This is essentially a summary of his grades and the comments on the report cards about whether he was to be passed on or not.

In first grade he got all satisfactory scores. But as early as second grade, when he's six or seven years old,

he's failing. And it says on the transcript, work of grade too difficult. So the limited intellectual functioning is evident from a very early age. They go ahead and put him back through second grade a second time. He got all satisfactory scores except he [112] needed improvement in reading. They put him in the third grade. He got three satisfactories, two B's and five C's. They put him in the fourth grade, where he got two satisfactories, three D's and four F's.

And the transcript says placed in fifth. In other words, this was a social promotion to keep him up. This wasn't because they believed that he necessarily passed fourth grade. And in fifth grade indeed, he doesn't do so well either, two satisfactories, six D's and two F's.

We don't have the sixth grade records. I think that he was in Newport News for a portion of that year.

In seventh grade he is back in Hampton. He gets one C, four D's and an F.

At this point he finally is referred for special education testing. But the form says that the screening committee decided not to do any screening. There's no details about why they chose not to do that, given his lengthy history of F's, having failed second grade, and having really been promoted out of fourth grade to keep up with his age group.

After this, he goes into eighth grade, where he gets all F's. And it says again on his transcripts, Daryl has not improved during this last [113] semester and, therefore, is still not meeting the requirements for promotion. What

they are making a reference to here is the literacy testing program, which I will explain in a moment.

Even though it says he didn't meet requirements for promotion, they put him in high school. In the ninth grade his GPA was a D-plus, and the first time he goes through tenth grade his GPA is a D-minus and the second time he goes through tenth grade his GPA is a D-minus.

Interestingly, at different points in his transcript, this is referred to as ninth grade, tenth grade and eleventh grade. There's one place that says he's in twelfth grade. What's happening is that Daryl is falling so far behind but he's at the age consistent with tenth, eleventh and twelfth grade, that it's no longer possible to easily categorize him.

What this data says to me, as well as some more that I'll show you, is that the limited intellect has been a part of Daryl his entire life. This isn't faked. This isn't manufactured because his life is in the balance. He is a slow learner and has been since as soon as we could start to take measures in second grade.

BY MR. SAUNDERS:

[114] Q You mentioned the literacy test.

A Yes.

Q Please identify the exhibit by number and name, please.

A This is Defense Exhibit Number 11. It's entitled Summary of Literacy Testing Program Scores. In Virginia, as in many states, we have a program where students need to pass a minimum test of reading, writing and

math. This is about minimal literacy. This is not about being a B or A student. They start getting it in the sixth grade. And the law says that you're supposed to have completed and passed all three portions before you can be promoted to high school.

In this case, when Daryl was given it the first time in sixth grade, he failed all three tests. In seventh grade, he passes reading by a matter of a few points. He failed writing and he didn't take math. After that, they only gave him one test at a time. In eighth grade he failed writing again. So he has passed reading and he's still failing writing.

And his eighth grade transcript has a letter attached to it, sent home to his parents, his mother, saying any eighth grade students in Hampton City Schools who have not passed all three tests by the end of the eighth grade will not have attained the status of a [115] ninth grader and, therefore, not be promoted to high school for the 1993-94 year.

However, they obviously did promote him and move him on to high school. And they continued to give him the test. They gave it to him again in ninth grade and he still failed. And then the second time he went through tenth grade, which is the last year that he was in school, they gave it to him again and he passed.

This is actually a time when Daryl had finally been put into some special education classes at a highly structured school, and for one semester his grades actually had some B's and C's in it and one A, if I recall correctly. And that particular classroom had a student-teacher ratio of eight students to one teacher. So it was the most

intense structured teaching environment that he had been in, and he was finally able to pass the math section, again by just a hair's breadth of a few points.

Q Can you give the jury some idea as to how this mental retardation of Daryl's affects him?

A Well, mental retardation is about limited intellectual ability. These are people who are slow to learn and, therefore, it starts to affect their social functioning. People who are slow to learn start to do poorly in school. On the whole, people who are [116] mentally retarded, especially teen-agers and young adults, start turning to peer relations as their primary way of feeling good and like they are mastering and doing something in their life because they are not going to make it in the academic sphere. Being mildly retarded does not mean that you're necessarily illiterate. There are some people who are mildly retarded who are illiterate and many who are not. It means that it's harder to reason, it's harder to learn any kind of new information or skill. It's harder to get a job. And, in fact, with Daryl's score he would automatically qualify for Social Security disability income for the evaluations that I do for Social Security Administration.

Q Is that kind of person a leader?

A I'm sorry?

Q Is that kind of person a leader?

A On the whole, people who are mentally retarded are not leaders. They tend to fall into groups because they can't make good decisions on their own. And when you look at their behavior patterns when they do things in

groups they look like they're doing better and when they do things on their own, they tend to do things in a fairly inept way.

Q Can psychologists predict whether someone will be violent in the future?

* * *

[119] risk to be violent at some point in the future.

Q All right. So what is risk assessment and how is it different than relating to future dangerousness?

A Well, risk assessment talks about a range of possibilities from low risk to high risk, and it talks about the context of the environment, in this case, being in a prison and what that does to risk factors. So I'll talk to you about things like low risk factors and high risk factors or sometimes what are known as protective variables, things that people have that actually reduce their risk, but I can't tell you that somebody will or won't do something. All I can tell you is that in general when people try to predict, yes, someone will do something, we're wrong more often than we're right.

Q And what are some of the main risk factors you would consider in making an assessment?

A Probably the first one to consider would be age.

Q Do you have an exhibit that helps us with that?

A I do. This is Defense Exhibit Number 9. It's entitled Number of Arrests for Murder in U.S.A. during 1993. The 1995 data just came out, and there's

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[121] just less maturity. And that's why teen-agers are more likely to do this.

You can see that as somebody ages and this is whether they are in the community or whether they are incarcerated, the number of arrests for homicide goes down dramatically until you get to the point of about 40 and it starts to level off. And that tells us that age is a tremendously important risk factor and that overall the probability that somebody is going to be violent is going to go down just because they get older.

Q What about prior acts of violence, do they affect whether a person can be violent in prison?

A Well, yes and no. Prior acts of violence are very important, especially in the data we have about community release; that is, people who have been violent and have been released to the community do have a much higher risk of being violent again. And then you have to look at the pattern of their violence. Is it long term, over many years, or is it in a spree over a short period of time? What other factors went into it? Within the prison, however, all of the data we have suggests that the risks for violence are relatively small and that the prisons do an excellent job of containing violence.

Q Do you have an exhibit that helps us

* * *

[126] Q Have you provided that to both Defense and the Commonwealth?

A It was provided to the Defense and then forwarded on to the Commonwealth, yes.

MR. SAUNDERS: We would ask that the report be admitted.

MR. HAHN: We have no objection, your Honor.

THE COURT: All right. Mark the report then, if you will – I don't think the Court has it.

THE WITNESS: Do you want to take my copy?

THE COURT: Mark that as Defense 13. Doctor, does the report contain small portions of what is on those charts, smaller versions of what is on those charts?

THE WITNESS: No, it doesn't, but the Court is welcome to ask Mr. Saunders for a set of those.

MR. SAUNDERS: I have them marked as the Court was marking them and provide them to the Commonwealth to review.

THE COURT: We can do either one. We can put the charts in, because there are ample charts involved, or we can put smaller versions of it in.

* * *

[128] A With regard to violence in the prisons?

Q Yes, sir.

A Well, we actually have, in Daryl's case, a sample of his behavior for just about eighteen months between the time of arrest and now in the jail system. And within the jail environment, he has not been in any trouble for any type of aggression or any significant institutional offense.

The issue is here that he is a mildly retarded individual who in the community has access to drugs and a lack of structure. And that explains a lot of how he gets involved in those violent behaviors. But within the structure of the jail and prison environment, his access to drugs is extremely poor.

The structure that a retarded person needs to keep them thinking straightly, knowing the rules, knowing what to do has been imposed and his behavior is very good. So there is a very high likelihood that he will be like most other Virginia inmates in that his likelihood of being violent within the prison is very small.

Q Are there any other characteristics about Daryl that might be relevant to risk?

A Well, substance abuse is a very [129] important risk factor. It's clear that people who are substance abusers have a very high risk for violence. Within the prison system there are people who manage to get access to alcohol and drugs. It's a comparatively small number of folks. So his likelihood of having that as a major risk factor is pretty small.

There are probably some other things about his background, for example, the fact that he was not with both parents through the age of sixteen, statistically, is a risk factor, but it's a risk factor again for people who are released to the community and is not relevant to being incarcerated.

Q You're talking about the risk assessment of Daryl while he's in jail, not while he's in public, right?

A Correct. Because prison is the environment, prison is where we need to wonder about what type of risk he can be.

MR. SAUNDERS: All right. Doctor, thank you. I have no further questions.

THE COURT: You may cross-examine. Sergeant, would you hand me those exhibits, please.

Cross-examination?

MR. HAHN: Yes, sir, your Honor. I

* * *

[144] malingering, and you touched on that subject at some length. And what is exactly malingering again, so we can start off and go from there?

A Sure. Malingering is the conscious and volitional; that is, intentional effort to fake a set of symptoms in order to appear mentally ill or in some instances to fake not having any symptoms in order not to appear mentally ill.

Q And could you tell us the four items or criteria that if are present the reviewer should strongly suspect malingering?

A Well, I'm sure I would have to look at the book to tell you exactly what it says, but there are a number of scenarios. And malingering is actually an area that I have special expertise on and have lectured in four different places around the state, teaching other folks how to do that.

Number one, is there some reason for the person to have a potential gain by faking a mental illness? And in almost all Court situations, there is an obvious potential gain, whether it's a reduced sentence or avoiding the death penalty or winning money in a personal injury suit.

Number two, we're looking for other types of scenarios where the gain may have some benefit in

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[146] Daryl Atkins never claimed any symptoms, never made any effort to present himself or bring up, for example, the term mental retardation in any way, shape, or form. There's no reason to think that this was an active part of his plan, especially when looking at all the school records.

Q Well, did you come to any conclusion as to whether or not the antisocial personality disorder was in effect here?

A Antisocial personality disorder.

Q I'm sorry, I thought that's what I said.

A He clearly has – I think you said order. A personality disorder is a set of personality traits or behaviors that are extreme to the point that's maladaptive. A simple example that folks would have been more likely to have seen in their day-to-day life is somebody that has obsessive-compulsive personality disorder. If you will pardon the expression, this is what people colloquially refer to as being anal. These are folks who are so focused on details that they can't see the big picture, to the point that they are as irritating as can be.

In the case of antisocial personality disorder, which you can't diagnose until somebody turns

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[162] to the remedial school instead.

Q Okay. So the presentence report from Hampton that states that the Defendant was never in special education, quote, unquote, is correct?

A From a semantic sense, that is correct. He was never officially, legally qualified for special ed as compared to the remedial classes we have been discussing.

Q Now, I'd like to go to your opinion section of your report, Doctor. You are specifically charged by the statute to inquire into whether the Defendant acted under extreme mental or emotional disturbance at the time of the offense, is that correct?

A Correct.

Q That's what the statute requires you to talk about?

A That's right.

Q All this other stuff is just leading up to the main course?

A That's right.

Q Would you read – you have your report in front of you?

A I do.

Q Would you read your opinion on that section to the jury, please.

[163] A From the data available, it is the opinion of the undersigned that Daryl Atkins was voluntarily intoxicated on substances at the time of the offense.

Q Now, how did you make that determination?

A Based on the information available from his report to me, from his statements to police, from his Co-Defendant's statements as well.

Q Would your opinion on that change if you knew that the people who saw him immediately after this incident saw no signs of intoxication?

A Certainly not. They weren't in a position to necessarily see them or not see them. Intoxication isn't always an obvious thing. And in fact when he goes to the hospital after this, they didn't even test his blood.

He's reporting, he's admitting to a negative behavior about himself, and there is information coming in from the Co-Defendant about this behavior. I don't think there is any reason to think that he was not high at the time.

Q Well, there's no doubt there had been a lot of drinking and smoking dope early in the day, right?

* * *

[167] BY MR. HAHN:

Q Now, the second part of that question Doctor, is whether or not the Defendant could appreciate the criminality of his conduct. It's true he understood his criminality very well, isn't it?

A Correct. As I said, my opinion is that there were no indications that Daryl could not appreciate the nature of his behaviors nor control himself.

Q Okay. And did you draw that conclusion from his attempts to conceal his guilt?

A No.

Q Okay.

A That's not how you draw the conclusions about whether somebody has a rational understanding of what's going on.

Q Okay. Well, let me ask you this: Since he was voluntarily intoxicated at the time, would that have had any impact on his goal-directed behavior?

A Absolutely. He's intoxicated on two types of chemicals, alcohol and cocaine. They have different effects. Alcohol, when people are high, reduce anxiety so people are more willing to do things that they would normally be anxious about and not do before. Crack cocaine makes people agitated and more likely to be [168] violent. In all research on crack, it increases aggression.

So those affect his judgment. The higher one gets on crack and the more intoxicated on alcohol, the less ability somebody has to exercise anxiety to stop yourself from doing something and the more likely they are to do something aggressive.

Q So Daryl Atkins was high on crack cocaine this night, and alcohol?

A That's my understanding.

Q Would it be fair to say that your expert opinion is that on August 17th, 1996 Daryl Atkins was able to understand the illegality of his actions and had the ability to behave appropriately had he chosen to do so?

A Right. I think that's what I said. That is my opinion.

Q And now we go to the third statutory inquiry, which is whether there are any other factors in mitigation relating to the history or character of the Defendant's mental condition at the time of the offense. And this – would you tell us your opinion on that issue?

A Well, there are a series of opinions that I believe you have already heard. Number one, that he is mildly mentally retarded and that contributes to [169] explaining why Daryl is involved in group offenses, why limited intellect would make him more susceptible to becoming involved with criminal behaviors and less likely to be employable and have reduced judgments and reduced understanding of the world in general around him compared to others.

Number two, that with regard to dangerousness issues within the context of a prison environment, that he has relevantly few risk factors, and his probability of dangerousness will go down over time because he's likely to get older.

Those are the two key issues.

Q Now, I want to ask you about it, before I forget about it, the – shooting Amanda Hamlin wasn't a group offense, was it?

A In fact, what's very interesting about that is his successful robberies are all ones where he has the help of other people. The time that he tries to do it by himself, he doesn't get to the robbery part. So that's another example of limited intellect and why it's hard for them to do things by themselves.

Q Well, let's talk about that now. Was it hard for him to turn around and pause and shoot Amanda Hamlin?

MR. SAUNDERS: Your Honor, the doctor

* * *

[171] robberies, and they are all in groups except for that one and that's the one where he does not get anything. So it's not in support or justification of the Defendant, it just may be an example of how limited intellect plays into problems even in a career as a criminal.

Q How many of those – how many other of those robberies, Doctor, was the victim shot?

A None.

Q Maybe the group behavior was an inhibiting factor.

A Yes, maybe he needed the supervision and that's why he does well in jail and in prison. As a retarded individual, he needs additional supervision to do better. When you leave him on his own, he does things that are just plain, old-fashioned dumb.

Q Well, is that because he needs supervision or because he needs drug treatment?

A That may be both, but he clearly needs supervision. He needs drug treatment, but that won't be germane to long-term incarceration in the prison.

Q Well, let me ask you if this statement in your report is correct. If the Defendant has successful substance abuse treatment and could be placed in a supervised home, then his risk of future dangerousness, if released to the community, might be

* * *

[176] were corroborated or not corroborated in the record and explaining the opinion.

I'm expressing two key opinions here. One is about mental retardation, which is substantiated by an IQ test and 13 years of academic records. And the other is at risk factors for aggression which is based on the research, the psychological research, and knowledge about Daryl Atkins' key features that are relevant to that.

Q I think there is a very important opinion that you left out that you are expressing here, Doctor, and I'll read it to you. You tell me where this fits in in the scheme of things.

From the data available to the undersigned, there were no indications that Daryl could not appreciate the nature of his behaviors and control himself.

That's a fairly important opinion, isn't it?

A Sure.

Q Just as important as whether or not he is mentally retarded?

A No, because again, there may be misunderstandings about this. There has never been a concern raised that this is a Defendant who is mentally

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[182] whether it's driving under the influence or possession or a felon, and it's all the same in terms of those risk factors. We treat them differently because of the nature of the offense. But from the psychological perspective, drug abuse is drug abuse when it comes to aggression.

Q And what evidence in the record did you find of Daryl Atkins' substance abuse?

MR. SAUNDERS: Judge, first, I think that was asked on their cross the first time and it was never gone into on my redirect. It's been asked and answered prior.

MR. HAHN: I'm following up on his answer.

THE COURT: I'll permit it one more time. It's been asked and answered several times.

THE WITNESS: The Defendant is reporting it, his mother is reporting it. In the records from the Court system, she reported it to the juvenile probation officers. It's documented in multiple places that he has been involved with drugs since around the eighth grade.

MR. HAHN: No further questions.

MR. SAUNDERS: No, sir, I am through with Doctor Nelson.

THE COURT: Any further need for

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Use of a firearm (F)
CODE SECTION	:	18.2-53.1
OFFENSE DATE	:	8/9/96
INDICTMENT NO.	:	1296-212

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Attempted Robbery (F)
CODE SECTION	:	18.2-26 & 18.2-58
OFFENSE DATE	:	8/9/96
INDICTMENT NO.	:	1296-211

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Attempted Robbery, as charged, in violation of Code Section 18.2-26 & 18.2-58.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Use of a firearm (F)
CODE SECTION	:	18.2-53.1
OFFENSE DATE	:	8/9/96
INDICTMENT NO.	:	1296-210

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Maiming (F)
CODE SECTION	:	18.2-51.2
OFFENSE DATE	:	8/9/96
INDICTMENT NO.	:	1296-209

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence as to malicious wounding and reduce on the grounds orally assigned and made a part of the stenographic record of this case, which motion the Court doth deny and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Maiming, as charged, in violation of Code Section 18.2-51.2.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

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[Names And E-mail Omitted In Printing]

CAPITAL SENTENCING EVALUATION

January 15, 1998

Bryan L. Saunders, Esq.
P.O. Box 1633
Newport News, VA 23601-0633

RE: ATKINS, Daryl

Dear Mr. Saunders:

Daryl Atkins has been charged with the capital murder, abduction, robbery and related felonies of Eric Michael Nesbitt. A co-defendant, William Jones, is charged with first degree murder. The offenses are alleged to have occurred on August 16, 1996, in York County. Per a court order of October 29, 1997, the undersigned performed a capital sentencing evaluation of the defendant upon motion of the defense, and is assisting defense counsel in the preparation and presentation of mitigation pursuant to VA code § 19.2-264.3:1(A,C). The following report summarizes the undersigned's opinions based upon the data available at this time.

SOURCES OF INFORMATION

1. Court order for the capital sentencing evaluation on motion of the defense.

2. Pre-disposition report of 1/9/96 from the Hampton J&DR Court for two counts of robbery.

3. Pre-disposition report of 11/21/91 from the Hampton J&DR Court for breaking and entering and grand larceny.
4. Presentence report of 4/15/97 for the Hampton Circuit Court on charges of robbery, abduction, use of a firearm, and aggravated maiming.
5. Hampton Court Service Unit school report.
6. Hampton City Schools transcript for 92-93, 93-94, and 95-96 academic years, and accompanying notes, as well as a telephone interview with Warren Kempf, a guidance counselor at Bethel School (757-825-4400).
7. Middle Peninsula Regional Security Center and York County Jail medical records for treatment of a gunshot wound to the foot.
8. Autopsy report for decedent Eric Michael Nesbitt.
9. Transcript of the Daryl Atkins' statement to police on 8/21/96.
10. Transcript of William Jones' statements to police on August 5th and 6th of 1997.
11. Results of the Wechsler Adult Intelligence Test – III (WAIS-III) administered to the defendant as part of this evaluation.
12. Interviews with the defendant's father (Phillip Atkins) and mother (Elvira Bullock).
13. Interviews with the defendant on 11/25/97 and 1/8/98.

NOTIFICATION OF PURPOSE

Prior to beginning the interviews, the purpose of the evaluation was explained to the defendant. Mr. Atkins

was advised that copies of this report would be sent to his defense attorney and that the report would initially be confidential. He was told, however, that if notice to present expert testimony was given through defense counsel, then this report would be forwarded to the Commonwealth's Attorney and no longer confidential. He was also told that statements he made regarding the offense could not be used as aggravation against him at the sentencing phase, but could be introduced as rebuttal to mitigation [VA code § 19.2-264.3:1 (G)]. This was explained to him in simple language that was appropriate for a defendant of limited intellect. Mr. Atkins was asked to explain back the notice of purpose several times, and at the beginning of each interview, to ensure he understood what this evaluation was about.

Mr. Atkins was advised that this psychologist is obligated to form unbiased opinions, but does have a statutory duty to assist the defense in the preparing and presenting information which might be mitigating. He understood that during cross examination the prosecution would ask questions not in the defendant's interests, and that this expert would respond truthfully.

GENERAL OFFENSE INFORMATION

Daryl Atkins and William Jones are accused of abducting, robbing, and murdering Eric Michael Nesbitt in York County on August 16, 1996. At the time, Mr. Atkins was 18 years old and the co-defendant was 26 years old. They forced the decedent to go get money for them from an automated teller machine. Later, they drove to the woods where the defendant was shot eight times

and killed. Mr. Atkins himself was shot in the leg. After the murder of Mr. Nesbitt, Mr. Jones drove Mr. Atkins to a local hospital for treatment. The decedent's body was left in the woods. Both defendants confessed to some degree of participation in the offense.

MENTAL STATUS DURING THE EVALUATION

Daryl Atkins was 20 years old at the time of this evaluation. He is an African American male of average height and build with no obvious identifying marks upon his person.

Mr. Atkins was oriented to the month, year, and where we were. He was unsure of the specific date at both our meetings; this could have been the normal disorientation to time that occurs with long-term incarceration, or attributable to his limited intellect. He complained of occasionally hearing fleeting voices, but upon investigation these were not psychotic hallucinations but more like loud thoughts to himself. This is not an uncommon symptom among individuals who have limited intellect and are under stress, such as awaiting a capital murder trial. His ideas were rational and there were no signs of delusions or thought disorder.

Mr. Atkins mood was mildly depressed at both interviews and he complained of some difficulties sleeping, ruminating on his forthcoming trial, and some hopelessness about the future. The depression did not interfere with his capacity to understand his legal situation or assist his attorneys.

The defendant's answers to questions were very brief, and it was hard to elicit information from him. His parents reported he has always been like this and his statement to police, while under stressful circumstances, was also marked by brief answers. His words were adequately articulated so that they could be understood. Based upon his presentation, the results of psychological testing, and his social history, there was no reason to be concerned about any severe neurological deficits that would affect his mental state under normal conditions.

PSYCHOLOGICAL TEST RESULTS

Daryl Atkins was administered the WAIS-III intelligence test. His Full Scale IQ score of 59 falls in the range considered Mild Mental Retardation. Less than 1% of the American population at large have a score of 59 or below. A summary table of IQ data follows:

WAIS-III DATA

Verbal Scales

Subtest	Scaled Score
Vocabulary	3
Similarities	3
Arithmetic	3
Digit Span	4
Information	5
Comprehension	3
Letter-Number Sequencing	3

Verbal IQ **64**

Full Scale IQ = 59

Performance Scales

Subtest	Scaled Score
Picture Completion	2
Digit Symbol-Coding	3
Block Design	4
Matrix Reasoning	4
Picture Arrangement	6
Symbol Search	4
Object Assembly	optional test, not administered
Performance IQ	**60**

The possibility that Mr. Atkins was malingering his performance on the IQ test was considered and ruled highly unlikely. From the available school records, it was evident that this defendant had always been of limited intellect. In 8th grade, he scored at the 15th percentile on standardized achievement tests; in 10th grade, he scored at the 6th percentile; he failed drivers education twice; and he barely passed the Virginia Literacy Passport subtests on reading and math. Furthermore, although a presentence report from 5/1/97 reported that the defendant was never in "Special Education," that is incorrect. After consultation with a Bethel High School guidance counselor who reviewed the defendant's transcript, it turned out that Mr. Atkins was, indeed, placed in a lower level classes for slow learners and in classrooms with intensive

instruction to remediate deficits. Furthermore, persons who are malingering IQ tests usually have an uneven pattern of scores on the multiple subtests because they do not know how many questions to answer accurately versus pretend not to know, and the results of Mr. Atkins' test was a fairly uniform pattern of scores.

Mr. Atkins IQ score might have been slightly higher if he were not mildly depressed at this time. However, it is unlikely that his scores would have improved so dramatically as to disqualify for him for the diagnosis of Mental Retardation. His depression was not that severe, and his scores on the subtests which are most sensitive to reduced performance in depressed individuals were not particularly low. And, as noted above, his limited intellect has been a consistent feature of his personality throughout life. His IQ score of 59 at this time is not an aberration, malingered result, or invalid test score, in the opinion of the undersigned.

OPINIONS

(i) Whether the defendant acted under extreme mental or emotional disturbance at the time of the offense.

From the data available, it is the opinion of the undersigned that Daryl Atkins was voluntarily intoxicated on substances at the time of the offense. While these are technically considered mental illnesses in the taxonomy of the *DSM-IV* manual of diagnoses, they may not be considered so under Virginia law and the preamble to the *DSM-IV* explicitly states that inclusion of a category of mental illness is not meant to supplant a legal decision by the court of jurisdiction.

(ii) Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired.

From the data available to the undersigned, there were no indications that Daryl could not appreciate the nature of his behaviors nor control himself. It is notable, however, that intoxication does impair judgement and self-control to some degree, even when it is voluntary. Intoxication may be relevant to mitigation in general because it is relevant to his mental state at the time.

(iii) Whether there are any other factors in mitigation relating to the history or character of the defendant's mental condition at the time of the offense.

In the opinion of the undersigned, the defendant meets criteria for the diagnosis of Mild Mental Retardation. This is substantiated by his Full Scale IQ score of 59 using the newest version of the Wechsler Adult Intelligence test. The diagnosis of Mild Mental Retardation requires deficits in both intelligence and the capacity to function independently. Information from his family members and school records substantiated him to have a reduced repertoire of behaviors consistent with a limited intellect, in that Mr. Atkins has limited literacy, could not do his own laundry, rarely was able to cook meals for himself, and had never lived on his own, and other basic life skills that most defendants his age have mastered.

Persons with Mild Mental Retardation have reduced judgement, a reduced ability to understand social situations, are less likely to be able to obtain and maintain employment, and may be more susceptible to social influence by others who are smarter or older. On the whole,

they are more likely to be followers than independent thinkers and leaders. Mental Retardation may be mitigating as specified in the Virginia code. Despite the general perception that Mental Retardation is common among capital defendants, this is not true. The undersigned has evaluated over 40 capital murder defendants in the Commonwealth of Virginia and Mr. Atkins is only the second individual who met criteria for mental retardation.

Mr. Atkins has a conviction history of multiple robberies with confrontation of victims, use of a firearm, and a conviction for having shot (but not killed) a previous victim. Most of these offenses occurred in a five month time frame when the defendant was binging on drugs and alcohol. And, most of the offenses took place with co-defendants. If the defendant had successful substance abuse treatment and could be placed in a supervised home, then his risk of future dangerousness if released to the community might be manageable through intensive structure and supervision. **Without these, however, his risk of aggression if released to the community at this time would remain high because of his age, drug habit, and limited intellect.**

However, this is a life without parole offense. The psychological research on risk assessment has consistently demonstrated that the environment in which one will live is relevant to future dangerousness. **By contrast to if he were in the community at large, it is the undersigned's opinion that Mr. Atkins' risk of aggression within the prison system is very low.** Past behavior remains the strongest predictor of future behavior, and in 16 months of pretrial incarceration the defendant has never been aggressive at the jail, violated major rules,

smuggled in or used drugs, or posed a behavior problem. Psychological research on criminal defendants suggests that, as a group, capital murder convicts may present less risk of violence within the prison as compared to other types of offenders. Furthermore, the Department of Corrections does an excellent job of controlling aggression in a population composed of our most violent citizens, as evidenced by the data published via the federal Bureau of Justice Statistics. Mr. Atkins risk of violence during a lifetime of incarceration would decrease as he aged, and some research suggests that prisoners become more mellow and conformist to the rules as they age. Information from his school records indicates that Mr. Atkins actually responds well to structured settings, as one would expect from a retarded individual. During his senior year of high school, he was placed in a special school with a student to teacher ratio of 5:1. In that intensely supervised environment, his grades substantially improved. Prison is a highly structured environment, and may have the same beneficial effect on Mr. Atkins' behavior.

The opinions in this report reflect the data available at this time. If additional data become available, I will be happy to review them and issue an addendum if they substantially modify my opinions.

/s/ Evan Nelson Ph.D.
Evan Nelson, Ph.D.
Licensed Clinical Psychologist

[Entered As Exhibit In Atkins Trial
April 28, 1998]

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF YORK

COMMONWEALTH OF VIRGINIA V. WILLIAM ALFREDRICK [sic] JONES	#96-8230

Stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and all other incidents during the trial of the case of Commonwealth vs William Alfredrick [sic] Jones, tried in the Circuit Court for the County of York, at Yorktown, Virginia, on February 26, 1998, before the Honorable Prentis Smiley, Jr., Judge of said Court.

* * *

[14] Frederic Troy Lyons

A Yes, sir, he did.

Q And were you able to substantially verify the veracity of those statements?

A I was able to determine the identity of the individual he named, and the relationship that individual had with Mr. Atkins.

Q Did he also tell you how the site was selected as far as the death – the death scene, specifically, the location of Atkins' grandfather's house?

A Yes, sir, he – he stated that Mr. Atkins was familiar with the area and had a grandfather that lived nearby to that area.

Q And, in fact, did you locate that – that grandfather?

A Yes, I did. He lived on Lee Road, which is about two and a half miles from that location in the Yorktown/Lackey area of the County.

Q Since you have – begin – questioning and working with the Defendant in 1997, have you found him to be cooperative and truthful in your investigation of what he has told you about this incident?

A Yes, sir.

MR. SMITH: That's all the

* * *

[Court Colloquy]

[38] testimony that my behavior put me here, not nobody else's, nobody else forced me, but my behavior.

And so this – from that note there is that I apologize. I just can't – I can only do – I'm very emotional, I'm very sorry for my behavior, my part of it.

I'm just – even though I didn't pull the trigger, I'm just as much to blame, even more, because I was the one who bought – he couldn't buy the liquor, I bought it. I went to 7-Eleven and bought it.

He might have – could've got the weed, you know, I – I don't know about that, but I know if I wasn't there, if I would have did one thing is, my first conscience told me, go home. If I would have went home to my father, I wouldn't be in this mess now.

THE COURT: The Court was not charged with making factual determinations in your testimony. The jury was charged with that responsibility.

You're under an obligation with your plea agreement to cooperate and to testify truthfully. That's your obligation. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And the Court was [39] not charged with making a determination as to whether you were testifying truthfully. That was the jury determination, as to whether you testified truthfully.

Do you understand that?

THE DEFENDANT: Yes, sir, I definitely understand that.

THE COURT: The recollection the Court has of your testimony, on the evening of August the 17, 16th and 17th, 1996 –

THE DEFENDANT: Yes, sir.

THE COURT: – at the place of the killing, on Crawford Road in York County, do you recognize that your testimony does not corroborate any of the forensic facts?

THE DEFENDANT: Does not corroborate?

THE COURT: No, sir.

THE DEFENDANT: No, I do not know that.

THE COURT: You indicated Mr. Nesbitt was not in the vehicle when he was shot, ever; is that correct?

THE DEFENDANT: Yes, I did.

THE COURT: Five feet away –

THE DEFENDANT: Yes, sir.

* * *

[Court Sentencing Jones]

[55] THE COURT: The Court is going to leave the sentencing guidelines attached. The Court will fill out the attendant sentencing guidelines that are appropriate to the two convictions, because the Court will need to fill out those guidelines to show why it has varied and departed from the sentencing guidelines. I will do so because of the absolute atrocity of this crime.

I don't know that it needs – those go to the Guidelines Commission, and I don't think that they're important, other than to the Guidelines Commission.

So if you're asking me to delete them, I can; I think it makes no difference.

MR. SMITH: My understanding was that they somehow ended up with the Department of Corrections office, but if they go no farther, then –

THE COURT: Once it's outside of this Court it goes to DOC. The Court is finished with its responsibility.

So we'll make proper inquiry to that, and if they need to be deleted to release that – then the Court certifies that Mr. Jones was present through all stages of these proceedings.

MS. ADDISON: Your Honor, if we

* * *

VIRGINIA: IN THE CIRCUIT COURT FOR
THE COUNTY OF YORK

COMMONWEALTH OF VIRGINIA	:	CASE NO. 98-8229 (6)
VS	:	
DARYL RENARD ATKINS	:	

Stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and all other incidents during the hearing in the above-styled cause, held in the Circuit Court for the County of York, at Yorktown, Virginia, on April 28, 1998, before the Honorable Prentis Smiley, Jr., Judge of said Court.

[Defense Argument At Post-sentencing Hearing]

* * *

[11] York authorities. It's not really clear which, the report and the statement shows August 5-6 of 1997, almost a year after the events of the crime. Again, Mr. Jones admitted that the crimes were committed but denied being the shooter. He blamed that on Daryl Atkins.

We ask today what happened between Atkins' statement on August 21st of 1996 and Jones' statement in August of 1997 except the forensics reports, which had been introduced.

Well, on March the 7th, of 1997, it shows from the probation report that's been introduced in evidence today

Mr. Atkins was convicted of 18 felonies in Hampton. You will also see, and I'm sure have noted, your Honor, from the reports that are in that probation report, these convictions were mainly based on confessions that Mr. Atkins had made, and that would be referenced to in his probation report, pages 4 and 4-A.

You'll also notice from those reports that Atkins had a gun only in the Hamlin maiming and attempt robbery, which crime he admittedly did alone. Only other individuals had guns in the rest of the Hampton crimes.

And as a result of those convictions of Mr. Atkins in the City of Hampton, he was sentenced to life in prison and a hundred and six years. And that was

* * *

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PSYCHIATRY FORENSIC PSYCHIATRY
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June 30, 1999

The Honorable N. Prentis Smiley, Jr.
Circuit Judge, 9th Judicial Circuit
300 Ballard Street
Yorktown, Virginia 23690

Re: Commonwealth v. Daryl Renard Atkins
York County/Poquoson Circuit Court Docket No. 8229

Dear Judge Smiley:

In response to your court order for the psychological evaluation of Daryl R. Atkins, entered June 13, 1999, I traveled to Sussex #1, on Friday, June 25, 1999, and conducted a forensic psychiatric evaluation of the defendant. The court order called for Mr. Atkins to be evaluated concerning his capacity to understand the proceedings against him, his ability to assist his attorneys, and any possible need for mental health treatment. As part of the evaluation process, it was necessary to review the documents listed below.

Sources of Information

1. Forensic psychiatric evaluation of Daryl Renard Atkins at Sussex #1, by the undersigned on June 25, 1999.

2. Capital sentencing report, psychological testing results of Daryl Atkins prepared by Evan Nelson, Ph.D, dated January 1998.

3. Daryl Atkins' records from Hampton City Schools

4. Handwritten letters prepared by Daryl Atkins.

5. Virginia Department of Corrections records of Daryl Atkins inclusive of current offense information, Presentence and Postsentence Investigation Report, School reports, Educational Transfer Summary, Juvenile Criminal History, Adult Criminal History Summary, Family Environmental Information, Offender Personal History, Community Supervision Plan and Summary, Criminal History Attachment, and Victim Impact Statement.

6. Mental Health Screening Form regarding Daryl Atkins, dated January 5, 1998.

7. Portion of trial transcript regarding Dr. Nelson's testimony given in Daryl Atkins' trial.

8. Documents regarding the Commonwealth of Virginia v. Daryl Renard Atkins:

   A. Grand Jury charges against Daryl Atkins, dated November 19, 1996.

   B. Order for Psychological Evaluation of Daryl Atkins, dated June 2, 1999.

9. Letter prepared by Dr. Nelson regarding Daryl Atkins, dated June 9, 1999.

10. Various correspondence from George M. Rogers, III, Esq., and Eileen M. Addison, Commonwealth's Attorney.

11. Telephone conference with attorney, George M. Rogers, III, on June 29, 1999.

Information Concerning the Crime

According to York County Commonwealth's Attorney, Eileen M. Addison, the following accurately describes the criminal case that led to Mr. Atkins conviction for capital murder and the death sentence.

> On Friday, August 16, 1996, Eric Nesbitt, a twenty-one year old airman, left his second job at an Advance Auto Parts store in Hampton, Virginia around 11:30 p.m. He went to the Crestar Bank across the street, went through the drive thru ATM and got $60.00 cash at 11:58. The transaction was recorded on video tape. Eric then stopped at a 7-11 store on the outskirts of Langley Air Force Base to get a midnight snack. Eighteen year old Daryl Atkins and a companion, William Jones, were at the 7-11 late in the evening. Atkins borrowed a pistol to take with him to the store. When Eric attempted to leave the store parking lot, Atkins and Jones abducted him at gunpoint. Jones got in the driver's seat and Atkins got in the passenger seat, keeping Eric sandwiched between them. Atkins and Jones robbed Eric of the cash he had on him and forced him to go back through the same drive-thru ATM at Crestar Bank and withdraw an additional $200.00. The video camera also captured this transaction on tape recording the date, time and all three occupants of the vehicle.
>
> Atkins and Jones then took Eric to a sparsely populated area of York County. Atkins got out of the vehicle and ordered Eric out. As Eric stepped from the truck, Atkins began shooting. With bullets flying into the cab of the truck, Jones bailed out through the driver's window, ran around the rear of the truck and grabbed Atkins causing Atkins to shoot himself in the left, lower leg. Atkins and Jones fled the scene leaving Eric's body on the ground riddled with 18 bullet holes. Around 1:30 a.m., Jones dropped Atkins off at Riverside Hospital where he received medical attention for the gunshot wounds to his leg.
>
> A passerby discovered Eric's body around 4:30 a.m. Eric was identified by the Advance Auto Parts paycheck still in his pocket. Investigators learned that Eric banked at Crestar Bank. The video tape showing his last two transactions was found to show Eric in his truck sandwiched between two, unknown black males. Atkins and Jones were identified after still photos from the video were distributed to the media.
>
> Atkins pled guilty to robbery and abduction but entered a plea of not guilty to the capital murder charge. He was convicted of capital murder and sentenced to death after a week-long jury trial. Jones testified against Atkins pursuant to a plea agreement that provided that Jones' punishment would be determined by a judge after a presentence report. Jones was ultimately sentenced to life imprisonment.

Procedural Background

According to information supplied to this forensic psychiatrist, Daryl Atkins, in February 1998, was tried and convicted of the capital murder of Eric Nesbitt, and he was sentenced to death. The Supreme Court of Virginia upheld the jury's finding of guilt but reversed the death sentence and remanded the case for resentencing.

The issue was an error that appeared on the verdict form. The jury found that the death sentence was justified because Mr. Atkins allegedly posed a serious threat to society and his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman. The Supreme Court reversed the death sentence because the verdict form did not provide the jury with the option of sentencing the defendant to life in prison if they found neither of the aggravating factors of future dangerousness or vileness.

Information from Prior Psychological Evaluations

Psychologist, Evan S. Nelson, Ph.D., evaluated Daryl Atkins and prepared a capital sentencing evaluation report dated January 15, 1998. Dr. Nelson's evaluation of Mr. Atkins was conducted pursuant to a court order, which provided the psychologist's services to defense counsel to assist in preparation and presentation of mitigation at sentencing. It was Dr. Nelson's opinion that when this was explained to Daryl Atkins, Mr. Atkins meaningfully understood the purpose of the evaluation and the limits of confidentiality.

The psychologist described Mr. Atkins as being oriented to person, place, month and year. Mr. Atkins tended to answer questions in short, brief sentences, but his speech was easily understood and appropriate to the material being discussed. The psychologist concluded that there was no reason to be concerned about any severe neurological deficits regarding the defendant. The defendant was noted to be mildly depressed with complaints of some difficulty sleeping, ruminations about his

trial, and some hopelessness about his future. However, the psychologist did not believe that the depression interfered with Mr. Atkins' capacity to understand his legal situation before the law or that it would prevent him from assisting his attorneys. No treatment was suggested or provided regarding the depression.

Mr. Atkins was administered the WAIS-III intelligence test, and scores of 64, 60, and 59, were described for verbal, performance, and full-scale IQ scales, respectively. Dr. Nelson was of the opinion that Mr. Atkins did not malinger while producing these IQ scores as they were in keeping with his educational performance. He was of the opinion that Mr. Atkins' IQ scores would have been slightly higher had he not been mildly depressed at testing but thought the defendant met diagnostic criteria for mild mental retardation. He deemed Mr. Atkins to be in need of substance abuse treatment.

Additionally, he stated that Mr. Atkins would benefit from the highly structured environment found within the prison setting.

Current Evaluation

Clinical Interview

Prior to beginning the evaluation, Mr. Atkins was informed of the identity of the examiner, the purpose of the examination, and the actual court order was read aloud to him. While he had not heard that I was coming to visit him, once he understood the nature of the visit and the content of the court order, he agreed to voluntarily participate. His answers were almost always brief

and to the point. Mr. Atkins denied taking any prescription medications at this time, and he denied having any allergies to medications. When questioned about a possible history of head injury, he denied ever having lost consciousness, but did recall being hit pretty hard and knocked down during a fight in the seventh grade.

Mr. Atkins stated that he was born in Newport News, Virginia, and attended public schools. He was able to name them without difficulty and recalled attending classes at York County/Williamsburg Jail. He has not taken courses since entering prison. He denied being the victim of physical, emotional, or sexual abuse within his childhood. He denied having a history of victimization. He admitted to a history of alcohol and substance abuse problems before his arrest and subsequent conviction. Recently, he refused urine drug screen testing on two occasions and could not or would not inform the examiner of his reasons. Concerning his sexual development, he first had sexual intercourse with a female at the age of sixteen or seventeen. He has not fathered children and estimates that he has had four or five different female partners during his lifetime. Mr. Atkins denied having any homosexual experiences. He declined to discuss his knowledge of safe sex practices.

According to Mr. Atkins, he has never held a valid driver's license and did not previously attempt to acquire one. When asked why, he stated that he used the bus system as his primary mode of transportation.

While reviewing his medical history with the examiner, he reported a history of asthma that does not require medication. He recalled having the bullet removed from

his left ankle and wearing a cast for this in 1996. He denied other fractures or serious injuries. When asked to describe his current situation, Mr. Atkins stated that he lives in a single cell. In the cell, he has a television, with cable, and a Walkman. He watches BET, ABC, TNT, TBS, and FOX. His favorite program is Rap City. Throughout the night, he enjoys television movies, primarily on the USA channel. He recalled recently having seen part of the *Ellie Nesler* story, stating, "I remember a little of it." Mr. Atkins smokes cigarettes, listens to music, watches television and reads *Vibe* and *Playboy* magazines. Each month, he receives a new magazine, which he orders with money given him by his family and friends. Mr. Atkins also keeps rap music cassette tapes, deodorant, hair grease, a toothbrush, toothpaste and a Bible in his cell.

Mr. Atkins exercises on Monday, Wednesday and Friday, approximately two hours each day. His workouts consist of eight sets of 25 push-ups; six sets of 40 sit-ups; fifty jumping jacks and running in place for twenty minutes. Mr. Atkins showers three days a weeks, after his workouts.

He described the food at Sussex #1 as "average". He reported eating all of the food brought to him. In addition, he consumes a 40-cent bag of Doritos daily, which he orders from the commissary. A prison counselor, Ms. Davis, occasionally visits him and handles "the visitation forms." He recalled that another female counselor has visited him on two or three occasions to talk about his adjustment to prison. He viewed her as being "somewhat helpful." Mr. Atkins receives visitors, which have included his father and paternal grandmother. He makes telephone calls to his mother and father, primarily on

Sundays. He would gladly see Dr. Nelson if he visited again and said the same about Mr. Rogers and Mr. Saunders. Mr. Atkins' sleep schedule has made visitation difficult.

Daryl Atkins reported that he sleeps from 7:00 a.m. until 2:00 p.m. He goes to sleep after eating breakfast. He awakens briefly for lunch and then naps until 2:00 p.m. He estimated his current weight to be 167 pounds, which, by his account, is more than he weighed at the time of his arrest. At night, he listens to rap music and watches television. In his mind, sleeping during the day may account for why he missed two or more visitors. He described his concentration as good if he is interested in the topic. He denied having crying spells at anytime for the past year and a half. Mr. Atkins keeps legal papers pertaining to his capital murder case in his cell for reference. He denied having homicidal or suicidal ideation.

At this point, Dr. Nelson's letter from June 9, 1999 was reviewed with Mr. Atkins. He did not recall declining to accept visitors. Instead, he said that he would gladly meet with family members and anyone else who cared to visit him. He informed the examiner that going outside for exercise tended to be futile because there are no outside basketball goals or exercise equipment for death row prisoners. Instead, he described this as a "cage". Guards verified this characterization. Its only benefit is that of "fresh air." He stated that if the death row outdoor area had basketball goals, free weights and music, he would use the facility.

Daryl Atkins was asked whether he sensed any depression. He stated, "Yes, my sleep pattern is messed

up." He indicated a willingness to take medication that would help him sleep and/or improve his mood. However, he could not comment on the severity of his depressed mood, which he characterized as intermittent. Ideally, he would like to fall asleep at 2:30 a.m., arise for breakfast, and then sleep until lunch. He described the sleep schedule as being the only symptom and/or situation he would like to improve. He described his energy as being a bit low at times and his concentration as "So, so – sometimes a little low." He did not report that his self-esteem was particularly low, but he did describe feelings of hopelessness and some difficulty making decisions at times. He expressed the view that his condition has been this way for the past seven to nine weeks. Yet, he does not report a loss of enjoyment, and his depressed mood is not pervasive. Also, he does not appear to be significantly anxious, and he did not describe symptoms of anxiety.

Mr. Atkins was asked a variety of questions to determine his competency to meaningfully participate in his resentencing hearing. When asked if he was present when Mr. Nesbitt was shot, the defendant responded, "Ask my lawyer." His answer was the same when asked if he believed he received a fair trial in 1998. Mr. Atkins demonstrated a clear understanding that capital murder trials involve a guilt and sentencing phase. He knew that he was to receive a new sentencing hearing granted to him by the Virginia Supreme Court. He believed this would occur in August 1999. When asked what he would have his attorneys communicate to the jury at his sentencing hearing, Mr. Atkins said, "That I'm not the person they think I am – not a bad violent criminal." He was not

embarrassed by, and he did not disagree with Dr. Nelson's diagnosis of mild mental retardation. Asked if he wanted the information regarding mild mental retardation communicated to the jury, he stated, "If it helps."

He acknowledged that he loved his family, and he suggested as possible mitigation witnesses, the following individuals: Elvira Bullock, his mother; Philip Atkins, his father; Virginia Atkins, his paternal grandmother; and Michael Bullock, his step father. After additional consideration, he also named Tracy Bullock, his stepsister, as a possible beneficial mitigation witness. He named two possible prison staff members who might be questioned about testifying on his behalf; Ms. Davis and the prison chaplain. Mr. Atkins has had little contact with the prison chaplain, but he expressed a willingness to meet with the chaplain if it would be beneficial.

Daryl Atkins knew that he could represent himself if he chose to do so. Instead, he prefers to be represented, stating his belief that he could work with his attorneys who he named as George Rogers and Brian Saunders. He also expressed having faith in their ability to represent him. When asked about the issue of remorse, Mr. Atkins made a coherent response. Daryl Atkins was given information concerning the challenges of presenting expert mental health testimony at a capital sentencing hearing, namely that doing so can open doors for the Commonwealth's Attorney to harshly question the mental health expert. Approximately thirty minutes later, Mr. Atkins was asked if he recalled the examiner's statement about the most difficult thing regarding the presentation of mental health testimony at a capital sentencing hearing,

and he responded, "Not to expose the case – it would be bad."

When the topic of whether Mr. Atkins would testify at his sentencing hearing was addressed, he stated, "I'd have to talk to my lawyer." When asked what he believed would be a fair sentence, Mr. Atkins stated, "Neither." A moment later, he stated that with regard to his involvement in the case, a fair sentence would be approximately, "Five years." The topic of his gunshot wounds was discussed in regard to his thoughts of what the jury concluded about them during his trial. About this Mr. Atkins said, "I guess they thought I did it." Mr. Atkins knew that the law would only allow him to receive the death penalty if all jurors voted for it. He stated, "money" was the difference between the outcome of his case and other more high profile cases. He understood that the jury could only decide between a life sentence or the death penalty at his resentencing hearing. In this regard, Mr. Atkins hopes he will receive the sentence of life in prison.

To assess his general fund of information concerning the adversarial process in our courts, Mr. Atkins was asked to define various terms. He stated that 'oath' meant a promise to tell the truth and that when people testify they, "tell their story – their side of it." He defined the word perjury to be "lying." Mr. Atkins stated that the judge at his sentencing hearing will follow the law and will rule on the jury's sentence. Additionally, he understood that it was the judge who instructed the jurors concerning the rules that govern the jury's decision making process.

Mental Status Examination

Daryl Atkins was alert and oriented to person, place, month and year. He did not know the precise numerical date. He was dressed in prison pants and a tee shirt. His hands were freed from the cuffs but leg shackles remained during the evaluation. His mannerisms were reserved, and his speech was soft spoken. Generally, he was polite, and his affect was reserved, but it was appropriately full range at times. His intellectual skills seemed to be in keeping with the previous diagnosis of mild mental retardation. He could make simple change and performed parts of the serial seven calculations. Mr. Atkins was able to read five sentences out loud for the examiner, suggestive of a sixth grade reading level. When asked to report the months of the year in reverse order, he did so but omitted September and March. He was able to spell the word 'world' backwards without difficulty. On similarity testing, he was correctly able to report all but the most difficult set. For instance, he stated that an 'apple, orange and banana' are fruit; a 'car, bus and airplane' are forms of travel; a 'table, chair and sofa' are furniture; and a 'boy, tree and ant' are all alive. When asked to report the similarity between a 'poem, statue and symphony' he said, "People make them." The fully credited response is art. When Mr. Atkins was informed of this, he remembered it when questioned about it fifteen minutes later, demonstrating ability to learn and remember.

When asked to interpret the proverb, 'Don't cry over spilt milk', he stated it meant, "Don't cry." He said that 'Look before you leap', means "Study before you do something." When asked about the old saying, 'Not all

that glitters is gold', Mr. Atkins said, "It could be fake." Insight testing by interview revealed that the defendant thought that income tax was necessary for "Buildings/ bills", and that child labor laws were important because, "It makes them be older so they can be responsible for the job." The correct answer concerns child abuse prevention.

When questioned about possible hallucinatory experiences, he denied ever having auditory, visual, olfactory, gustatory or haptic hallucinations. There is no evidence that he is now or has at anytime suffered from delusions. Daryl Atkins denied having a history of significant psychiatric treatment, and he denied a family psychiatric history of mental disorders.

Diagnostic Formulations

Modern psychiatry calls for the use of a multiaxial assessment system, along five axes in the following manner:

Axis I:	Clinical Disorders
	Other conditions that may be the focus of clinical attention
Axis II:	Personality Disorders
	Mental retardation
Axis III:	General Medical Conditions
Axis IV:	Psychosocial and environmental problems
Axis V:	Global Assessment of Functioning (GAF)

At this time, it is my professional opinion, to a reasonable degree of medical certainty, that the following diagnostic assessment is the most appropriate for Daryl Atkins:

Axis I: Depressive Disorder, Not Otherwise Specified (NOS)
Polysubstance abuse in full remission
Axis II: Antisocial Personality Disorder – by history
Mild mental retardation
Axis III: Remote history of asthma, currently not requiring treatment
Axis IV: Problems related to interaction with the legal system
Axis V: Current GAF score of 65, indicative of some mild symptoms and difficulty in social functioning

Each condition noted above will be described in more detail at this time.

Depressive Disorder, NOS, is a category of depression given to an individual when the depressive features do not meet the criteria for a more clearly delineated disorder. In the case of Mr. Atkins, he likely will prove to have Dysthymic Disorder, which is a chronic mild depressive condition consisting of poor appetite or overeating, insomnia or hypersomnia, low energy or fatigue, low self-esteem, poor concentration or difficulty making decisions, and/or feelings of hopelessness. In order to meet the diagnostic criteria for Dysthymic Disorder, two or more of the above mentioned symptoms must be present for at least two years. Mr. Atkins has some degree of insomnia, low energy, problems with concentration and occasional feelings of hopelessness. However, he has not had these for the necessary two years to qualify for the diagnosis of Dysthymic Disorder. Therefore, the most

appropriate diagnosis would be Depressive Disorder, NOS, at this time.

His history of Polysubstance abuse is noted for the sake of completeness. By his report, he has not abused substances while incarcerated. Therefore, his condition concerning substance abuse is in full remission in a controlled environment.

The Antisocial Personality Disorder describes the pervasive pattern of disregard for and violation of the rights of others occurring since age fifteen. In my opinion, the defendant's multiple arrests and convictions for criminal behavior, which will not be reviewed at this time, strongly suggests that the Antisocial Personality Disorder is accurately recognized in him.

Mild mental retardation is noted among individuals with IQ scores that range between approximately 50 to 70. Individuals with mild mental retardation are generally equivalent with the educational category of "educable." They appear, to be relatively normal in their academic skills in elementary school, but during the teenage years are noted to have academic skills that reach approximately the sixth grade level. People with mild mental retardation usually achieve social and vocational skills adequate for minimum self-support, but they may need supervision, guidance or assistance when under unusual stress. However, those with mild mental retardation, with appropriate support, are usually able to live successfully in the community.

While Mr. Atkins reports a history of asthma, there was no indication of audible wheezing during my evaluation of him, and he denied requiring medication for bronchospasm at this time.

Clearly, his most important psychosocial stressor concerns his previous conviction of capital murder and a new sentencing hearing. Mr. Atkins' current GAF of 65, is in the middle of the range of mild symptoms. This means he has mild symptoms and/or some difficulty in social functioning. Generally, people with mild symptoms are functioning reasonably well and have some meaningful interpersonal relationships.

The depressive disorder described above for Mr. Atkins would be reasonably expected to respond favorably to one of the modern antidepressive agents. Antidepressive medications and counseling would be expected to alleviate his depressed mood and facilitate a more normal sleeping pattern. I suggest that these interventions be offered to him at Sussex #1, without undue delay. My opinions have not been communicated to Sussex #1; this task should fall to another.

Opinions Concerning Competency

Based upon my four hour evaluation of Mr. Atkins and a comprehensive review of the records noted in the 'Sources of Information' section of this report, it is my professional opinion, to a reasonable degree of medical certainty, that he currently possesses the capacity to understand the legal proceedings against him in reference to the resentencing hearing. It is also my opinion that he is competent to assist his attorneys in the preparation and

presentation of his case in mitigation. Although he is competent at this time to proceed with the sentencing hearing, Mr. Atkins would benefit from antidepressive medication and counseling to treat symptoms of a mild depressive disorder.

Truly yours,

/s/ R S Brown
Robert S. Brown, Jr., M.D.

cc: Brian L. Saunders, Esq.
George M. Rogers, III, Esq.
Eileen M. Addison, Commonwealth's Attorney

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF YORK

COMMONWEALTH OF VIRGINIA	:	CASE NO. 99-R1-8229
VS	:	
DARYL RENARD ATKINS	:	

Stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto and all other incidents during the trial in the above-styled cause, held in the Circuit Court for the County of York, at Yorktown, Virginia, on August 18, 1999, before the Honorable Prentis Smiley, Jr., Judge of said Court, and a Jury.

* * *

[39] Mary Sloan

gentlemen.

THE COURT: Thank you, Mr. Rogers.

Call your first witness.

MS. ADDISON: Thank you, your Honor.

Mary Sloan.

THE CLERK: Mary Sloan, come into the Courtroom, please. Mary Sloan.

MARY SLOAN,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Good morning. Could you state your name, please.

A Mary Sloan.

Q Ms. Sloan, you might want to pull that microphone down a little closer.

[40] Ms. Sloan, where do you live?

A Gilbertsville, New York.

Q And how big of a town is Gilbertsville?

A It's a village of about 500 people.

Q And how long have you lived there?

A Twenty-one years.

Q Okay. Who else do you live there with?

A My husband and my three youngest children.

Q And how many children do you have, total?

A Five.

Q And what are their names and ages?

A Marshall is 20. Julie is 19. Brenda is 13. Tim is 9, and Ethan is 7.

Q Okay. And your other two children, one is Eric Nesbitt, is that correct?

A That's my oldest son, yes.

Q And how old was Eric when he died?

A He was 21.

Q And your other son that doesn't live with you?

[41] A He's in the Army.

Q Where is he stationed?

A He's at Fort Campbell, Kentucky.

MS. ADDISON: If the witness might be handed Commonwealth's Exhibit 70 through 72. We can do them individually.

BY MS. ADDISON:

Q The Bailiff is handing you what's been marked as Commonwealth's Exhibit 70. Do you recognize that photograph?

A Yes, that's me and my children at our family reunion we went to two weeks before Eric died.

Q Where was that family reunion?

A At my folks' house in upstate New York.

Q Where was Eric living at that time?

A He was in the Air Force at Langley Air Force Base.

Q Can you identify so when the jury sees the picture they can see which one of them is Eric in that picture?

A He's the tall red-haired guy in the back with the impish grin. He must have done [42] something.

Q Does he seem to be laughing in the picture?

A Yeah.

Q Is that characteristic of Eric's personality?

A Yeah, he was known for getting things going and keeping people's spirits up and doing funny things to make people laugh.

Q Where was Eric raised?

A In Gilbertsville.

Q And can you describe for the jury what kind of hobbies or interests he had when he was growing up?

A He liked fishing and camping and hiking and he was in Scouts. He liked sports. He liked playing all kinds of sports.

Q You said that he was in Scouts?

MS. ADDISON: If the Bailiff would hand Ms. Sloan Commonwealth's Exhibit Number 71.

(A document was handed to the witness.)

BY MS. ADDISON:

Q Do you recognize that photograph, Ms. Sloan?

[43] A Yes, that's Eric when he received his Eagle Scout Award in 1993.

Q In 1993?

A Yes.

Q How long was he involved with Scouts?

A Let's see. About 11 years, I think.

Q For the benefit of the members of the jury that may not know, can you describe what's involved in becoming an Eagle Scout?

A The Eagle Scout Award is the highest award a Scout can get. You have to achieve 20 merit badges, which are kind of difficult to do. And you have to do a number of service projects for the community or for your scouting organization, and take on a lot of leadership duties in the scouting organization in order to do that.

Q Do you recall what some of those community projects or leadership roles were that Eric did to earn that?

A Well, for his Eagle Scout service project, he arranged painting of the Masonic Lodge where his Scout troop held their meetings. He had to arrange for materials and people to do the job [44] and clean up and everything involved in that.

Q Anything else?

A He also helped arrange, for one of his service projects, arranged the painting of fire hydrants in town.

Q Was he involved in any other way with the Fire Department or Rescue Squad?

A Yes, he was. He helped organize the Explorer Post in town, which was affiliated with the local Fire Department and Rescue Squad. They had never had one before, and he was instrumental in getting it founded.

And he became a member of the Fire Department when he became old enough to be in it. And he took the training for the first responders and took the training for the Rescue Squad, the Explorer training for the Rescue Squad.

MS. ADDISON: If the Bailiff would hand Ms. Sloan Exhibit Number 72.

(A document was handed to the witness by the Bailiff.)

BY MS. ADDISON:

Q Ask if you recognize that photograph?

A This was Eric with his Explorer Post at the firehouse in front of the rescue truck [45] that they sometimes used.

Q How long was he involved with the Fire Department and Rescue Squad?

A I guess about two years. You have to be 18 to join the Fire Department, but he was with the Explorer Post before then. I think you have to be 16 to be an Explorer. It was about two years before he went into the Air Force.

Q Okay. You say that he was involved in all of this primarily while he was in high school?

A Uh-huh. Yes.

Q And did he, in fact, graduate from high school in Gilbertsville?

A Yes, he did.

Q When was that?

A In 1993, in June.

Q Did Eric work at all in addition to going to school in Gilbertsville?

A Yes, he did. He worked from the time he was about 15 until he was about 18 for our neighbor's dairy farm, helping with chores.

MS. ADDISON: Your Honor, I would move that those three exhibits be readmitted and ask that they published to the jury.

[46] MR. ROGERS: No objection, your Honor.

THE COURT: All right. The Court will admit, without objection, Commonwealth's Exhibit 70, 71 and 72.

MS. ADDISON: Thank you.

(Commonwealth's Exhibits Number 70, 71 and 72 were received in evidence.)

THE COURT: Ladies and gentlemen, at this point I'll explain to you the reason for the sequential number of these things. These exhibits were formerly admitted into the guilt phase of the case and rather than renumbering them, having two numbers on them, we're using the same numbers, okay?

MS. ADDISON: Thank you, your Honor.

BY MS. ADDISON:

Q And how long did he do the farm work while in school?

A About three years.

Q Anything in particular he did with the money he earned from that?

A He was pretty careful with money, and you can't work a lot of hours on the farm anyway [47] when you're that age, so he saved what he made and he put it towards his school clothes and his basketball shoes and running shoes when the time came for those seasons.

Q Helped you out a lot, I'm sure.

A Oh, yeah, definitely.

Q What did Eric do after he graduated from high school?

A He entered the Air Force about two months after he graduated from high school.

Q And where was he stationed initially?

A At Lackland Air Force Base in Texas.

Q Do you recall how long he was there?

A About six months for basic training and technical school.

MS. ADDISON: Ask if Ms. Sloan could be handed Commonwealth's Exhibit Number 1. (A photograph was exhibited to the witness.)

BY MS. ADDISON:

Q Do you recognize that photograph?

A That's Eric in his Air Force [48] uniform.

Q Do you recall when that was taken?

A Right at the beginning of basic training when he was 18.

MS. ADDISON: Your Honor, we'd move that be admitted and published to the jury.

MR. ROGERS: No objection, your Honor.

THE COURT: Commonwealth's Exhibit 1, make it part of the record and the evidence in the case.

(Commonwealth's Exhibit Number 1 was received in evidence.)

BY MS. ADDISON:

Q And where was Eric stationed after his basic training?

A At Langley Air Force Base.

Q In Hampton?

A Uh-huh.

Q When did he move to Hampton, do you recall?

A I think it was February of '94.

Q And from the time he was stationed in Hampton or went into the Air Force, about how [49] often did you have contact with Eric?

A He called occasionally, and then he came upstate about four times a year when he was able to.

Q What was Eric's relationship like with his brothers and sisters?

A Well, he was their big brother and it was a job he took seriously. He was really good with them, and they

were crazy about him. So glad to see him come when he came. And he was good with them, did things with them, played with them and bought them things. He was really great with them.

Q What kind of things would they do when he came back to visit after he went in the Air Force?

A Oh, he would take them places, the younger guys, especially, they were just little – little guys, and they would always want to go to Paddy's Farm, our friends' farm there. And he would come pulling in the driveway in his little truck and the little guys would be bursting out of the house, Eric, Eric, and then they would have a big argument who got to go with Eric in his truck to Paddy's Farm.

And I remember the last Christmas [50] he was home he took them down to the community Christmas tree so they could see Santa Claus come to the community Christmas tree.

Q And did he maintain contact with his friends in Gilbertsville as well?

A Yes, he had a lot of friends in Gilbertsville, and he saw them when he came up. The friends' farm, especially, that I mentioned, he would help out there a lot when he came in.

The last time he came up, he made a special point of helping his friend Andy there fix his pickup truck that he used on the farm there. He spent a lot of time doing that.

Q When was that last visit, Ms. Sloan?

A It was the end of July, 1996.

Q How long was Eric home at that time?

A Three days.

Q And you said you had a family reunion?

A Yes.

Q Who all was at that?

A Well, most of my brothers and sisters and aunts and uncles, and people from all [51] over up and down the East Coast came to it, I guess.

Q And were you aware of any additional jobs that Eric had, other than his work in the Air Force?

A Yes, he had a part-time job at an auto parts store, I believe it was.

Q And do you know why he was doing that extra work?

A He'd had a minor accident with his truck, and he needed a little extra money to pay for the repairs to it.

MS. ADDISON: Your Honor, the Commonwealth would ask that Commonwealth's Exhibit Number 8 be shown to Ms. Sloan.

(A photograph was handed to the witness.)

BY MS. ADDISON:

Q Do you recognize that photograph?

A That's Eric's truck.

Q That photograph shows two trucks, does it not?

A Yeah, Eric's is the small purple Nissen.

Q When did Eric first get the truck?

A In the summer of '95, 1 think.

Q Do you know how he paid for it or –

A He took out a loan to pay for it himself.

Q It appears to be much smaller than the other truck in the picture.

A Yeah, it's just a tiny, it's just a real small truck.

MS. ADDISON: I'd ask that that be admitted as well, your Honor.

MR. ROGERS: No objection, your Honor.

THE COURT: All right. Mark it Commonwealth's Exhibit 8, make it part of the evidence in the case.

(Commonwealth's Exhibit Number 8 was received in evidence.)

BY MS. ADDISON:

Q Ms. Sloan, the last time when Eric was home in July, or on other occasions, did you have an opportunity to discuss with him what his future plans were?

A Yeah, he talked some about possibly staying in the Air Force. There wasn't a [53] lot of opportunity up where we live and he liked the Air Force, liked the people, he had a lot of friends in it. He did say he might make a career of it.

Q Do you know if he had gotten any promotions in the Air Force?

A He didn't tell us, but I guess he apparently had been very close or had gotten one by the time that he came up the last time. He was pretty modest about things.

Q Describe for the jury, if you would, Ms. Sloan, how you were notified of Eric's murder?

A When someone in the military dies they send out a death notification committee. And I happened to be outside on the 17th of August, and I saw a van pulling up and two guys in uniform got out, and I knew something had happened to Eric because you never see anyone in uniform up where we live. And they told me that Eric had been murdered. I couldn't believe it.

Q Was there anyone home with you that day?

A Just the kids, I guess. We had just gotten back from another family reunion and Dan, my husband, hadn't gotten home yet. So I had [54] to track him down. But within ten minutes the house was filled with people from the community, who were just as shocked as we were.

Q Did you have the funeral service there in Gilbertsville?

A Yes. It was packed at the church. It was terrible seeing Eric's coffin up there at the front of the church where he had taken part in so many Sunday School activities and programs. It was hard for the people at Gilbertsville. They didn't understand.

Everybody liked Eric. And they had to come out and talk about him. And some of the people that liked him the

best couldn't even talk about it until a lot later. I felt so bad for them, putting them through that.

Q What about your other children, Ms. Sloan, can you describe for the jury what kind of effect it has had on them?

A I think it was hard on – really hard on Julie because she was really close to Eric. And she was a sensitive teenager, and nothing like that had ever happened anywhere we knew of. And she didn't know how to deal with it.

And Marshall, his next oldest [55] brother, he's kind of a funny guy that doesn't talk much or talk about his feelings or anything. But he – he entered the Army about a year after Eric died, and when he was getting ready to go into the Army, the recruiter told him you're going to be doing some guard duty. And he had done a lot of hiking and camping up in the woods and stuff. And one night he hiked down to the cemetery and slept on Eric's grave. He wanted to be close to him.

And the younger kids, they were so close to Eric, and he was such a great brother to them, they really don't understand. And they can't really talk about it to other people because they just – it's not something that happens around Gilbertsville, and young kids don't understand. But they know that something terrible happened to their brother.

One morning at breakfast Nate sat there and counted, one, two, three, four, five, six, seven, eight. That's how many times Eric got shot. And that's not something you really think of a seven-year-old doing.

Q Did anyone in your family have counseling to try to deal with Eric's murder?

A I had a little counseling after [56] Eric died but it didn't seem to do any good, I just sat there and cried for an hour. I don't know how you can counsel for something like this.

Q I know it's difficult to do, Ms. Sloan. Can you explain to the jury what effect this had on you as a mother in dealing with your other children?

A It's created in me such a big fear that I never felt before. You never think that something like this is going to happen. But now that this has happened to Eric, I really – I'm really scared that something's going to happen to them. I know it's unreasonable and I shouldn't think that way, but I can't help it. And I look at other young children and I think, oh, my God, what's going to happen to them. Is something awful going to happen to them, too?

MS. ADDISON: Thank you. I have no further questions.

THE COURT: Your witness.

MR. ROGERS: Ms. Sloan, we're all so very sorry.

And I have no questions of this witness, your Honor.

THE COURT: All right. Any [57] further need for Ms. Sloan?

MS. ADDISON: No, sir. I'd ask that she be allowed to remain in the Courtroom.

THE COURT: Fine, if there is no further need for her.

And you are excused or you may have a seat in the Courtroom.

THE WITNESS: Thank you.

THE COURT: Next witness.

MS. ADDISON: Mark Armitage.

THE CLERK: Mark Armitage, come into the Courtroom, please.

MARK ARMITAGE,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Good morning.

A Good morning.

[58] Q Would you state your name, please.

A Mark Armitage.

Q Mr. Armitage, how are you employed?

A U. S. Air Force.

Q And how long have you been in the Air Force?

A In May it will be ten years.

Q Where do you live?

A I live in Rome, New York now.

Q And how long have you been in New York?

A Almost exactly two years.

Q Where were you stationed before that?

A Langley Air Force Base.

Q How long – what period of time were you at Langley?

A I got to Langley in June of '93 and I was there until September of '97.

Q And what division or what exactly did you do in the Air Force?

A I was a vehicle mechanic with First Transportation.

Q And that's when you were at [59] Langley?

A Yes, ma'am.

Q Are you doing the same thing now?

A No, ma'am.

Q You got a promotion?

A Yeah.

Q Good.

MS. ADDISON: Your Honor, the Commonwealth would ask if Mr. Armitage could be shown Commonwealth's Exhibit Number 1.

(A photograph was exhibited to the witness.)

BY MS. ADDISON:

Q Mr. Armitage, I ask you, do you recognize that photograph?

A Yes, I do.

Q And who is that?

A Eric Nesbitt.

Q How is it that you know Eric Nesbitt?

A He was one of my best friends.

Q When did you first meet him?

A When he got to Langley. He got to Langley in January of '94.

Q Okay. And did you work together?

[60] A Yes, ma'am.

Q And explain to the jury, if you would, please, how that relationship developed.

A It's like a close unit, everyone is, like, friends. We would hang out after work. He would come to my house. My wife – him and my wife were in Tech School together. That's where they get trained for their job. They were real

close. We'd barbecue together, just do lots of stuff together.

Q About how often did you and your wife spend time with Eric?

A Saw him every day.

Q Every day?

A Every day. Sometimes twice a day.

Q Can you describe for the jury what kind of person Eric was, his personality?

A He was very kind. He would give his left arm if you needed it. He would give you anything you needed.

Q Anything in particular he ever gave you?

A When I went TDY – that's temporary duty – we go TDY a lot. When I went to Saudi Arabia, he stayed with my wife and watched my [61] wife while she was pregnant, helped her out.

Q What about his work in the Air Force, what kind of worker was he?

A Hard working. Very hard working.

Q Do you know what rank he was or –

A He was about to put the senior airman on.

Q What is that?

A E-4.

Q When was that promotion, do you recall?

A Sunday. He was killed on Friday, and he was supposed to put it on Sunday.

Q Had he been told about the promotion?

A It's automatic, unless you get in trouble, and Eric was not a person to get in trouble.

Q Did you ever have an opportunity to talk to Eric about what his future plans were?

A Yes, I did. He was going to make the Air Force a career.

Q What about how he got along with other people, friends or co-workers?

A To my knowledge, Eric didn't have [62] an enemy in the world.

Q Did you see him on August 16th of 1996?

A Yes, I did.

Q Where was that?

A We had a squadron picnic. It was – I think the squadron got together, they normally get together and have a good time, show squadron camaraderie, get together and have a good time. We played volleyball, softball, all kinds of sports, horse shoes, had a barbecue.

Q Do you recall Eric's mood that day?

A Yeah, he was in a good mood, happy mood, like always. I can't say anything, he was always in a good mood.

Q Did you ever see Eric again after that picnic?

A No, I did not.

Q How did you learn about Eric's murder?

A Detective Lyons, an OSI agent, and another detective came to my house and were questioning me.

Q When was that?

[63] A Saturday morning, the 17th.

Q Can you describe for the jury the effect that Eric's murder had –

MR. ROGERS: If it please the Court, there is a matter I think we need to take up out of the presence of the jury.

THE COURT: All right. Ladies and gentlemen, I'm going to take this opportunity to take our 10:30 recess, and I will ask that you retire to the jury room. Obviously, do not begin your deliberations at this time.

The Court will call you back in about ten or 15 minutes.

Captain, if you could maybe get some of these chairs back there for them.

(The jury retired to the jury room.)

THE COURT: All right. The jury has been retired.

All right, Mr. Rogers.

MR. ROGERS: Yes, sir, if the witness could be excused for a few moments, your Honor.

THE COURT: All right. Sir, if you will please stand down, go outside the hearing [64] of the Courtroom. Don't discuss your testimony with the other witnesses.

Leave the exhibit there.

(The witness was excluded from the Courtroom.)

THE COURT: The witness has also been separated.

MR. ROGERS: Yes, sir. If the Court please, due to the unusual nature of this procedure that deals only on a resentencing and does not get into the proof of the case, I think that what we're going along and what the Defense objects to with Mr. Armitage's testimony, I think that the Commonwealth is getting quite far afield with this matter.

The first witness who testified was the victim's mother. Surely under victim impact we did not make any objection to her testimony on this.

I think that what we're getting into – I realize that there was testimony by this witness at the former trial of this case back in February of 1998. If the Court please, we're under a completely different set of circumstances today. The Defense objects to this continuing testimony,

* * *

[71] A From myself and my wife it was a little difficult. She had the baby three days – she was pregnant. She had our son three days later. They left on Saturday around, I think, four o'clock in the afternoon. I had to call the Chaplain. She wouldn't stop crying. I had no idea how to calm her down. I was trying to deal with it myself and also help her.

Q What about your co-workers in the Air Force?

A Everybody was extremely hurt, didn't understand what was going on, because not only do you not wish this to happen to anyone you know, but especially a person like Eric, who would give you anything you wanted, basically a nice, easy-going, fun-loving guy. And they couldn't believe it happened to him.

MS. ADDISON: Thank you. Answer any questions Mr. Rogers may have.

MR. ROGERS: I have no questions of Mr. Armitage, your Honor.

THE COURT: Any further need for Mr. Armitage?

MS. ADDISON: No, sir, I don't believe so.

[72] THE COURT: All right. Thank you, sir. You're free to go or you may have a seat in the Courtroom.

Next witness.

MS. ADDISON: Sarah Armitage.

THE CLERK: Sarah Armitage, come into the Courtroom. Sarah Armitage.

SARAH ARMITAGE,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Good morning. Could you state your name, please.

A Sarah Armitage.

Q Sarah, how old are you?

A I'm 24.

Q Where do you live?

A Syracuse, New York.

[73] Q And how long have you lived in Syracuse?

A Two years, I believe.

Q Where did you live before that?

A I lived in Hampton, Virginia.

Q And how long did you live in Hampton?

A Between Hampton and Newport News, about three years.

Q Okay. And what brought you to Hampton?

A I was in the Air Force.

Q Are you still in the Air Force now?

A I'm still – what am I? I'm active duty in the Air National Guard for New York.

Q And how long have you been with the Air Force?

A With the Air Force? Six years.

MS. ADDISON: If she could be shown Exhibit Number 1.

BY MS. ADDISON:

Q Ask if you recognize that photograph?

A Yes, I do.

[74] Q Who is that?

A That is Eric Nesbitt.

Q How is it that you knew Eric Nesbitt?

A He – I worked with him. We went to Tech School together.

Q Where was that?

A It was a school for our jobs.

Q Where did you go to school?

A Lackland Air Force Base, Texas.

Q Do you know about when that was?

A It was the end of 1993, late December.

Q And how did your relationship develop after Texas?

A Eric was stationed here at Langley in January, and we just – we worked together. We were the same age, same schedule, lived in the same dorm. We just started hanging around.

Q And during that time about how often did you spend time with Eric?

A Every day.

Q Every day?

A Every day.

Q Did you work with him?

[75] A Yes, we worked together and usually did something after work together.

Q What type of worker was Eric?

A He was a hard worker, a good worker. He would do just about anything for anybody.

Q Do you know any specify examples of things that he did for you or other workers?

A As far as – well, once I had a TDY to Cuba, and my husband was in Saudi at the time and he was supposed to be coming back. And Eric knew I didn't want to go to Cuba, so he volunteered for – he volunteered and went for me.

Q He went for you?

A Yes.

Q Can you describe for the jury your relationship with Eric?

A We just – we were really close friends, did a lot of stuff together. We did basically everything together. He was like a brother.

Q Did you ever talk with him about his plans for the future?

A A little bit.

Q Do you know what they were?

[76] A He was going to stay in the Air Force and make a career out of it.

Q Do you know whether or not he ever had any problems with other co-workers?

A No, I don't know of anybody that didn't like him.

Q Okay. Do you recall the last time that you saw Eric?

A It was Thursday night, I believe, before, the night before he was murdered.

Q Where was that?

A That was at my apartment. He had stopped by.

Q Your husband testified about a picnic that happened. Did you go to the picnic?

A No, I was pregnant at the time. I was on bed rest. So I was home.

Q When was your baby due?

A It was due August – I think August 19th or 20th he was due.

Q How did you learn about Eric's murder?

A My husband told me. I don't remember who it was that came to my house. I know an OSI agent, Detective Lyons and another police [77] officer, I don't know who he was. They just questioned us about a bunch of stuff about Eric, and I had no idea. And then they told my husband out in the hallway and told him to come tell me.

Q Were you still on bed rest at that time?

A Yes, I was.

Q I know it's difficult to do, but can you describe to the jury the effect of that news and Eric's murder had on you?

A At first I was yelling, I didn't believe it, said they were full of it, you know. And like then started having contractions. I can't really explain it, because I just – I just lost my best friend.

Q Okay. You considered Eric your best friend?

A Yes, I still do.

MS. ADDISON: Answer any questions Mr. Rogers may have.

CROSS-EXAMINATION

BY MR. ROGERS:

Q What date was your baby born, [78] Ms. Armitage?

A He was born on August 20th.

MR. ROGERS: Okay. Thank you, very much. That's all the questions I have.

THE COURT: Any further need for Ms. Armitage?

MS. ADDISON: No, sir.

THE COURT: All right. You're free to go, Ms. Armitage, or you may have a seat in the Courtroom.

THE WITNESS: Thank you.

THE COURT: Next witness.

MS. ADDISON: George Duncan.

THE CLERK: George Duncan, come into the Courtroom, please. George Duncan.

GEORGE DUNCAN,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[79] BY MS. ADDISON:

Q Would you state your name, please.

A George Duncan.

Q Where do you live, Mr. Duncan?

A 104 Lakeland Crescent, Yorktown.

Q How long have you lived there?

A Four years.

Q How are you employed?

A I'm active duty Air Force, stationed at Langley Air Force Base.

Q How long have you been with the Air Force at Langley?

A I have been in service for 16 years.

Q And how long have you been stationed at Langley?

A Thirteen of them.

Q Thirteen. Okay.

MS. ADDISON: Again, I would ask that Mr. Duncan – there is a photograph labeled Commonwealth's Exhibit Number 1.

THE WITNESS: I see the picture.

BY MS. ADDISON:

Q Do you recognize that photograph?

A That's Eric Michael Nesbitt.

[80] Q And how is it that you knew Mr. Nesbitt?

A I was Airman Nesbitt's supervisor at Langley.

Q Do you recall when you first met him?

A I had returned from TDY, I believe it was around – I can't remember the year.

Q Okay. About how long were you his supervisor?

A I was his supervisor for the time he was at Langley for two years, almost three years that he was at Langley.

Q Can you describe for the jury what kind of employee he was?

A You know, a young kid, immature, but very responsible. You think, you know, an 18-year-old kid, you

know, he hadn't experienced a lot of life and he didn't know a lot of things, but Eric was a hard worker, and he had a real sense of humor about him. Because of his shyness, he would open up through his sense of humor. So it was nice to have a kid that would work that hard. He knew when to work and when to play, and he had a real good sense of humor.

[81] Q Did he ever have any problems at work with his co-workers?

A Absolutely not. Absolutely not.

Q Did you ever have an opportunity to discuss with him what his plans were for the future?

A I know he planned on staying in the Air Force. He enjoyed it. He had just returned home from a trip with his parents and had talked with them about re-enlisting in the military. I know that he was looking forward, when he was murdered, he was a week away from putting on his next stripe, which was real important to him.

Q What was that promotion?

A That would have been to senior airman.

Q And that was supposed to happen when?

A He was a week away from it when he was murdered.

Q You said that was very important to him?

A Yes, I had to escort Eric home to his family. I had to go through his personal belongings. And he had

already paid and had his [82] uniforms lined up in his closet with his new rank already on his uniforms.

Q Did you stay at Gilbertsville for the funeral?

A Yes, ma'am.

Q Can you describe to the jury what that was like?

A Even now with my 16 years in service, I know escorting Eric home was the hardest thing I've ever done. I was ashamed to take that little boy home in a pine box to his mom. He was a good kid.

Q Do you recall about how many people were in attendance at the funeral?

A I know that over 40 people from Langley alone took it upon themselves to come up to the funeral, plus, of course, the military honor guard and several other things. So there was over 50 people there but there was approximately 40 people from Langley that had taken it upon themselves to drive up there.

Q What about people from Gilbertsville?

A I couldn't count them. The church was filled. It was a small town, but it was packed. [83] You know, there was just so many people you couldn't count them. The church was packed to capacity.

Q You said there were a lot of people from the Air Force. Can you describe for the jury the effect that Eric's murder had on his co-workers?

A I had taken Eric home, so I was there a few days for the funeral, but during the viewing, people who hadn't seen Eric at all since he had left the party, the last

time they saw him alive, so when they got there, it was a few hours before the viewing, and I remember them walking into the funeral home, seeing Eric and instantly walking back out because they couldn't handle seeing him like that. One of my peers, one of the supervisors from the shop just broke down in tears, just seeing Eric in that state, because, again, they hadn't seen him since – the last time they saw him he was alive.

MS. ADDISON: Answer any questions that Mr. Rogers may have.

MR. ROGERS: I have no questions, your Honor. This witness can be excused.

MS. ADDISON: Thank you.

THE COURT: Mr. Duncan, you may [84] have a seat in the Courtroom or you're free to go.

Next witness.

MS. ADDISON: Vivian Brown.

THE CLERK: Vivian Brown, come into the Courtroom, please. Vivian Brown.

VIVIAN BROWN,

called as a witness by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Good morning. Could you state your name, please.

A Vivian D. Brown.

Q And Ms. Brown, how are you employed?

A I'm employed for the Hampton School System.

Q And what do you do?

A I'm a SIPS coordinator.

[85] Q What is that?

A Detention – it used to be detention, but it's an in-school program for children that cannot deal in the classroom.

Q Do you have any children of your own?

A Yes, I have five.

Q Was there a time that you worked at the Advance Auto Parts Store in Newport News?

A Yes, there was.

Q When was that, do you recall?

A About two or three years ago, something like that.

Q There is a photograph in front of you that's been marked as Commonwealth's Exhibit 1. Ask you if you recognize the person in that photograph?

A Yes, I do.

Q Who is that?

A Eric Nesbitt.

Q How is it that you knew Eric Nesbitt?

A I worked with Eric, and we worked at Advance Auto together.

Q About how long did you work with [86] Eric?

A Two or three months.

Q Can you describe for the jury his personality?

A Eric was a hard-working young man. He was young, because he told me he was 21. And I enjoyed Eric. We worked – the night that he died we closed together. In closing, I mean we were cleaning up, getting the store ready for the next day. Eric was a caring person, because that night when we closed up, I got off earlier than he did, and he asked could he bring my car to me, because it was raining that night. And I told him to just watch me as I got into the car to make sure I was safe. And the last thing I remember was Eric watching me get in my car and saying good night.

Q How did you learn about his murder?

A They called me from work the next day because we were supposed to work together the next day.

Q Can you describe for the jury the effect that his murder had on you and other co-workers of yours?

A It hurt me very bad, ma'am. And [87] the store was pretty upset. And I cried the entire day. It was hard for me to work, because I had just seen him, you know.

MS. ADDISON: Thank you. Answer any questions that Mr. Rogers may have.

MR. ROGERS: I have no questions of Ms. Brown.

THE COURT: Ms. Brown, you may have a seat in the Courtroom or you're free to leave.

THE WITNESS: Thank you.

THE COURT: Next witness.

MS. ADDISON: Investigator Lyons. Your Honor, for this witness we'll be using some of the video equipment.

THE COURT: All right. Sergeant, if you will get that set up for us.

THE CLERK: Investigator Lyons, come into the Courtroom, please. Investigator Lyons.

INVESTIGATOR F. T. LYONS

called as a witness by the Commonwealth, having been [88] first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Would you state your name, please.

A Investigator Troy Lyons.

Q And how are you employed, Mr. Lyons?

A Employed with the York County Sheriff's Office, work in the Criminal Investigations Division.

Q And how long have you been so employed?

A Been with the Sheriff's Office it will be 11 years in September.

Q And how long have you been an investigator?

A It will be eight years in October.

Q Okay. Any special training or experience as part of your job?

A I've gone through a number of crime scene processing courses, fingerprint processing courses, fingerprint identification. [89] Also, I attended ten weeks of the Virginia Forensic Science Academy.

Q Were you so employed on August 17th of 1996?

A Yes, I was.

Q And were you involved in the investigation of the murder of Eric Nesbitt?

A Yes, I was.

Q And what was your involvement in that?

A I was contacted at approximately 4:45 a.m. on August 17th of 1996 and directed to respond to the intersection of Crafford Road and Tower Road in York County, where the body of a white male, who we subsequently identified as Eric Nesbitt, was found.

MS. ADDISON: And your Honor, if I might, I'd like Commonwealth's Exhibit 5 and 6, if we can set that up by Investigator Lyons.

THE COURT: Do you want that set on the tripod?

MS. ADDISON: Yes, sir, that would probably be the easiest.

THE COURT: Did you want to proceed?

[90] MS. ADDISON: Not yet, your Honor, if we might get this set up, because doing it might be a distraction from the testimony.

BY MS. ADDISON:

Q Investigator Lyons, directing your attention to the two exhibits which are behind you, one is Exhibit Number 5 and the other is Exhibit Number 6.

Do you know which one is which, so we can clarify it in the record?

THE BAILIFF: The large one is Number 6 and the small one is Number 5.

MS. ADDISON: The small one being behind.

BY MS. ADDISON:

Q Then directing your attention first to Exhibit Number 5, you mentioned that you were called to Crafford Road. Can you explain what is shown in that exhibit?

A Yes, ma'am, this is a overhead –

THE COURT: That's 6.

MS. ADDISON: I'm sorry, 6.

THE WITNESS: It's an overhead photograph that was done by the York County Computer Support Services, that shows Crafford Road, as well [91] as the intersection Crafford Road with Tower Road.

BY MS. ADDISON:

Q Can you point on Exhibit Number 6 where that intersection is that you're referring to?

A Yes, ma'am, this is Crafford Road and this is the Newport News end of Crafford Road (indicating), which runs along and curves around, and that's the York County end of Crafford Road. This is the intersection right here of Crafford Road and Tower Road (indicating), which is located in York County.

Tower Road is blocked off by a gate right here (indicating), which goes back to a tower site, and Crafford Road is a two-lane, asphalt-paved road that runs from Newport News into York County.

Q And describe for the jury, if you would, please, what type of area that is.

A It's a desolate, dark area, heavily wooded. The nearest houses, there is one house at the Newport News city line approximately seven tenths of a mile up the road, and then the nearest house in York County is approximately a mile and two tenths up the road from this location at this intersection (indicating).

[92] Q And the exhibit behind, which I guess that's Exhibit Number 5, can you describe that, if you would, please.

A This is a computer printout of the area of all of Lackey and Crafford Road. And in this black box area (indicating), this shows again the intersection of Tower Road and Crafford Road. And this shows where it is all surrounded by trees, which is part of the Newport News water shed property.

Q You said that you were called to that intersection, that area of York County, on August 17th, approximately what time?

A Approximately 4:45 a.m. is when I received the call. I arrived on the scene at approximately 5:15 a.m.

Q And when you arrived there, who was present?

A Lieutenant Holloway, who was the shift lieutenant, and Sergeant Diggs and Investigator Kimber Extine, all with the York County Sheriff's Office.

Q What did you find at the scene?

A Once I arrived on the scene, there was a white male lying facedown more onto the Tower [93] Road part of the intersection of – he was lying facedown on the asphalt portion. There were several three-by-five cards which were covering items of evidence that were previously identified by Investigator Extine.

The white male had on a white T-shirt and blue jeans, dark colored pants. And we could tell that the front of the shirt was covered with a red substance that appeared to be blood.

Q What, if you recall, were the weather conditions that morning?

A It was approximately 72 degrees that morning. It was quite humid. There was a light mist in the air. I don't know if you would classify it as a fog, it was between a fog and an actual mist. It had rained up until about midnight of that – earlier that morning, but it had been dry. And the victim's clothing was dry with the exception of the areas that were blood stained.

Q And how, if you did, identify the body that you found there?

A He was identified through a pay stub that was in one of his pants pockets, as well as identification that was subsequently recovered from his barracks room on Langley Air Force Base.

[94] Q Did you take photographs there at the scene?

A Yes, I did. I photographed the crime scene as it was when I arrived and during the course of collection of evidence.

MS. ADDISON: Your Honor, we would at this time like to display to the jury a few of the crime scene photographs. I think it's easiest if the lights at least on this side of the Courtroom were dimmed.

MR. ROGERS: Do we have numbers on that, Madam Commonwealth?

THE COURT: Numbers on the exhibits that are shown?

MS. ADDISON: The exhibits that correspond with these pictures, your Honor, there are certainly more

that we intend to introduce but they are Exhibits 7 and 12 through 18.

MR. ROGERS: Thank you.

MS. ADDISON: Not all of them are displayed, I believe just four of them.

THE COURT: All right. That's 12, 13, 14, 15, 16, 17 and 18.

MR. ROGERS: That was my understanding, your Honor.

[95] (The Commonwealth Attorneys conferred.)

THE WITNESS: Remove the lens cover.

THE COURT: Remove the lens cover. Does that do it?

THE WITNESS: No, sir.

THE COURT: It won't do it. Do you want to get down and do it?

THE WITNESS: I can do that, sir.

THE COURT: Why don't you do that.

(The witness left the witness stand to adjust the computer display.)

THE COURT: Can you see the images okay? Can the jury see the images okay?

THE JURORS: Yes.

THE COURT: Dim the lights in the center of the Courtroom. Turn them all off.

MS. ADDISON: That's better.

BY MS. ADDISON:

Q Describe, if you would, Investigator Lyons, what's shown in the picture here.

A This picture depicts the position [96] that Mr. Nesbitt's body was found in when I arrived at the scene. The glowing kind of diamond-looking shape, that is one of the posts where the fence, the wires connected blocking off Tower Road. Crafford Road runs just to the right, just out of the view of the picture in this particular image.

This is a close-up of Eric Nesbitt as he was found at the scene. And we noted that on the ground his shirt was stained with blood on the bottom side. The top side of his shirt and the back of his shirt, which is visible, was relatively dry, did not appear to have been rained on or had been wet during the night.

This is a picture that was taken just as the sun was coming up after we rolled Mr. Nesbitt's body over. This picture here shows the fence or the wire that blocked off Tower Road and better shows the intersection there where Crafford Road is. Again, Crafford Road would be just to the right of the right side of the picture.

And this is a close-up of Mr. Nesbitt's body. We had lifted up the front of his shirt to view any possible injuries he may have had that was the source of the blood, as well as search his pockets for identifying documents.

[97] Q What, if any, did you see as far as apparent injuries?

A He had numerous injuries that appeared to be bullet holes in his left arm, in his abdomen, in his left lateral chest, as well as there was, I believe, one in his right arm. We later located another injury, bullet injury to his right leg.

MS. ADDISON: Your Honor, I would ask that Investigator Lyons identify Exhibits Number 7 and 12 through 18.

THE COURT: Again, the Court asks if that is 12 through 18, inclusive?

MS. ADDISON: Yes, sir.

THE WITNESS: Exhibit Number 7 is the overall photograph that was taken of the position of Mr. Nesbitt's body, which was photograph number one in the power point presentation.

BY MS. ADDISON:

Q Probably more simply, Investigator Lyons, if you could just review, make sure those are the accurate exhibit numbers, and then you can identify the packet.

A Okay. Exhibit Number 12 is another one of the overall photographs that was [98] taken.

Exhibit 13 is a close-up of one of the photographs that was taken.

Exhibit 14 is also a photograph that was taken at the scene.

Exhibit 15 is a close-up photograph that was taken at the scene.

Sixteen is also a photograph that was taken at the scene.

Seventeen is a photograph, close-up of the victim's face that was taken at the scene.

And 18 is a close-up of the victim's face that was taken at the scene.

I took all of these pictures.

Q Do they all accurately depict what you observed there that morning?

A Yes, they do.

MS. ADDISON: Your Honor, we'd move to readmit Commonwealth's Exhibit 7 and 12 through 18.

MR. ROGERS: No objection, your Honor.

THE COURT: How about 5 and 6?

MS. ADDISON: Yes, sir.

[99] THE COURT: Exhibits 5, 6, 7 –

MR. ROGERS: No objection to that either.

THE COURT: – 12 through 18, inclusive, as Commonwealth's exhibits and make them part of the evidence in the case.

(Commonwealth's Exhibits 5 through 7 and 12 through 18 were received in evidence.)

BY MS. ADDISON:

Q What was done next in your investigation?

A After attending the autopsy, a search was made of Eric Nesbitt's barracks room on Langley Air Force

Base. And based on documents that were found in that room, we contacted Langley Federal Credit Union and Crestar Bank to determine if any transactions or activity had occurred on Mr. Nesbitt's bank account.

Subsequent to our discussion with employees from the bank, we had learned that there was, in fact, transactions on his Crestar Bank account. We learned that on the 17th.

We contacted Crestar Bank again on the afternoon of the 20th and learned that there was [100] a video tape of the ATM transactions that had occurred on the night of the 16th and the early morning of 17th. I went to the Crestar Bank corporate offices in Norfolk and secured and obtained that copy of the video tape as well as some still photos.

Q And what, if anything, did you do with the video tape?

A Once I got ahold of the video tape, I took it back to our office. And using the equipment in our office, I printed still photographs of a number of the frames off of the video tape in order to distribute to area law enforcement agencies and the news media.

MS. ADDISON: Your Honor, we would at this time ask to display for the jury the presentation.

BY MS. ADDISON:

Q Can you describe for the jury the ATM presentation. You developed this, is that correct?

A Yes, I did. The presentation that will be shown is frames off of the ATM video tape. Using equipment in

our office, we played the video tape frame by frame, captured the individual frames. [101] and then digitized them into the computer.

The difference between the computer presentation and the actual video tape itself is during the course of the – during the course of the video tape, there were several times when a motion sensor inside the bank kicked in and switched the camera inside the bank to an empty bank. Those frames were removed, as well as there were several frames that were duplicated, where the time lapse tape took maybe two or three frames in one second. And it would be just duplicate images, so those images were also deleted from the presentation on the computer.

MS. ADDISON: Your Honor, I would ask at this time to show this presentation as far as the ATM video.

THE COURT: What's the exhibit number that this corresponds with?

MS. ADDISON: It corresponds with Exhibit 19, your Honor.

THE WITNESS: May I help Mr. Hahn, your Honor?

THE COURT: The witness would like to run the power point.

THE WITNESS: If you can click on [102] the square. All right. And then the slide-show button in the lower left.

(Photographs were displayed through power point presentation to the jury.)

BY MS. ADDISON:

Q Can you describe what this particular frame is?

A This is one of the first images that we looked at on the video tape. It is an image from August 16th, 1996 at 11:52 p.m. and 14 seconds. This was an image that was taken that shows Mr. Nesbitt making a withdrawal from his bank account at Crestar Bank at the Coliseum Crossing Branch. This withdrawal was in the amount of sixty dollars.

This frame, which was taken on August 17th, this would be at 12:16 a.m. and 30 seconds. This was the first frame that showed Mr. Nesbitt's vehicle coming back into view of the ATM camera at approximately 20 minutes after the prior transaction.

This is the first frame of the video tape which showed the individuals who were with Mr. Nesbitt during this particular transaction.

[103] This individual is William Alfredric Jones, who was identified as the driver. Eric Nesbitt sitting in the middle. And this individual on this side was subsequently identified as being Daryl Atkins.

These frames just go through and show the transaction. These are actually still photographs that were taken one by one.

This frame here shows Mr. Atkins with his ATM card getting ready to do the withdrawal at the machine.

MR. ROGERS: Excuse me just a second.

MS. ADDISON: Mr. Nesbitt.

THE WITNESS: Mr. Nesbitt. Excuse me.

MR. ROGERS: Your Honor, I object to the running commentary by the witness. I think the reason we have photographs is that, as a very wise person said, it's worth a thousand words. We have no objection whatsoever to the jury being shown this. We have interposed no objection to that. And I think the pictures speak for themselves.

For Mr. Lyons, who clearly was not there, to fill in background on this, I think is [104] improper. I think that the pictures will speak for themselves. We have no objection to that, just to his running commentary of it.

MS. ADDISON: We have no problem, just go through the frames.

MR. ROGERS: Thank you.

THE COURT: You're welcome.

(Photographs were further shown on the power point presentation.)

MS. ADDISON: Your Honor, I would at this time ask Investigator Lyons just to identify Exhibit Number 19, the printout of each of these stills.

THE WITNESS: Exhibit Number 19 is the still photographs that were taken from the same video tape that the power point presentation was made from.

MR. ROGERS: And we have no objection to its admissibility, your Honor.

THE COURT: All right. We'll mark that as Commonwealth's 19, make it part of the evidence and the record in the case.

MS. ADDISON: Thank you, your Honor.

[105] I'd also ask that Investigator Lyons be given Exhibit Number 4.

BY MS. ADDISON:

Q If you can, explain to the jury what that exhibit shows.

A Exhibit Number 4, this is an aerial photograph of the area of Hampton, which shows right here (indicating) is the Coliseum Crossing Branch of the Crestar Bank, where the ATM transactions occurred.

Q Did you, in your investigation., subsequently identify where the Defendant, Daryl Atkins, lived?

A Yes, we did. He lived in the apartments, which are located up here at the top of the screen (indicating). He lived in Apartment Number 89, which is located right in about that area right there (indicating), at Sacramento Apartments.

Q And did you have occasion as part of your investigation to drive, in order to check the distance, from the bank to the spot on Crafford Road where Mr. Nesbitt's body was found?

A Yes, I did. On September 15th of 1996 at 5:06 a.m., I went to the Crestar Bank located here, the Coliseum Crossing Branch of [106] Crestar, pulled into the drive-up window at the ATM, left there and drove the most direct route that I could think of from there to Crafford Road, which was out to Mercury Boulevard and then over to I-64, onto I-64 to the Route 238 or Lee Hall Exit off of I-64,

and then Route 238 direct to Crafford Road to the intersection with Tower Road. It took me 24 minutes to make that drive in that direction. It was 18-and-a-half miles.

I only ran into one traffic light on the entire trip and that was the traffic light at Route 238, or Yorktown Road, and Route 143, or Jefferson Avenue.

Q And how long a trip was it?

A It took me 24 minutes to drive it, and that was driving at the posted speed limit.

MS. ADDISON: Thank you. Answer questions Mr. Rogers may have.

MR. ROGERS: I have no questions of Detective Lyons at this time, your Honor. I'd ask that he still been [sic] sequestered.

THE COURT: All right. Do you want Number 4 to come in?

MS. ADDISON: Yes, your Honor. Ask that Number 4 be admitted.

[107] MR. ROGERS: Okay.

THE COURT: The Court will admit Number 4 and 19, without objection, make them part of the record in the case.

(Commonwealth Exhibits Number 4 and 19 were received in evidence.)

THE COURT: Investigator Lyons, you're excused; you're not to leave. Ask that you still be sequestered. Do not discuss your testimony with the other witnesses.

Next witness.

MS. ADDISON: Doctor Leah Bush.

THE CLERK: Doctor Leah Bush, come into the Courtroom, please. Doctor Leah Bush.

THE COURT: I need to initial 5, 6, 7, 4 and 19.

THE BAILIFF: Yes, sir.

(The witness was duly sworn.)

THE COURT: You may proceed.

DOCTOR LEAH LINDA ELIZABETH BUSH,

called as a witness by the Commonwealth, having been [108] first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ADDISON:

Q Good morning. Would you state your name, please.

A Doctor Leah Linda Elizabeth Bush.

Q And how are you employed, ma'am?

A I'm the Assistant Chief Medical Examiner for the Commonwealth of Virginia in the Tidewater District.

Q And how long have you been so employed?

A Over ten years now.

Q And are you licensed to practice medicine in the State of Virginia?

A Yes, ma'am.

Q And how long have you been so licensed?

A A I've been licensed to practice medicine for about 15 years.

MS. ADDISON: Your Honor, I believe that we have a stipulation.

[109] MR. ROGERS: So stipulated, Doctor Bush's imminent qualifications, both as a medical doctor and also as a medical examiner specializing and an expert in pathology.

Good to see you again, Doctor Bush.

THE WITNESS: You, too.

THE COURT: Does that adequately state your area of expertise, Doctor Bush?

THE WITNESS: Yes, sir, forensic pathology is my subspecialty area.

THE COURT: All right. The Court, without objection of Defense and with stipulation, certifies this witness as an expert medical examiner, a forensic pathologist.

That means, ladies and gentlemen, that in her areas of expertise she can render opinion evidence.

BY MS. ADDISON:

Q Would you, Doctor Bush, explain to the jury what forensic pathology is.

A Forensic pathology is the study of medicine involving the examination of the body and internal organs to determine natural death – excuse me, natural disease, patterns of injury and cause of [110] death, with reports being generated for court proceedings, such as we have here today.

Q And what specifically are your duties with the State Medical Examiner's Office?

A My duties and responsibilities are to perform autopsies on individuals and investigate the death of individuals that die violent deaths, such as homicide, suicide, or accident, as well as people who are unattended by a physician at the time of their death and people who die under suspicious circumstances.

Q Were you so employed in August of 1996?

A Yes, ma'am, I was.

Q And did you, in fact, perform the autopsy on the body of Eric Michael Nesbitt on August 17th of 1996?

A Yes, ma'am, I did.

Q Did you assign a number to that autopsy and report?

A Yes, I did.

Q What was that?

A T394-96.

MR. ROGERS: No objection to its admissibility, your Honor, to the report.

[111] MS. ADDISON: Your Honor, I would ask to mark for identification Doctor Bush's autopsy report Number 42. There was an accompanying toxicology report previously admitted as Exhibit 45.

THE COURT: All right. Without objection then –

MR. ROGERS: Without objection, your Honor.

THE COURT: – the Court will mark Exhibits 42 and 45 as part of the evidence and the record in the case.

(Commonwealth's Exhibits Number 42 and 45 were received in evidence.)

BY MS. ADDISON:

Q Did you in the course of performing the autopsy, Doctor Bush, take photographs?

A Yes, ma'am, I did.

MS. ADDISON: Your Honor, I'd ask that Doctor Bush be given for identification Exhibits 43-A through and including 43-H.

Additionally, there is Exhibit 44, which is a diagram.

Give the Clerk a moment to catch [112] up, your Honor.

It would be easier for Doctor Bush to have all of the photographs together.

THE COURT: All right.

MR. ROGERS: May I approach the Commonwealth, your Honor?

THE COURT: Yes.

(The Commonwealth and Defense Counsel conferred.)

MR. ROGERS: Thank you, your Honor.

THE COURT: You're welcome. All right.

MS. ADDISON: Do you have all of them now?

BY MS. ADDISON:

Q I would ask, Doctor Bush, if you would, in referring to the number on each of the exhibits, if you can identify them and in so doing and use of the diagram, which is Exhibit 44, explain your findings when you performed the autopsy on Mr. Nesbitt.

A Certainly. The first photograph is 43-A. Do I publish this to the jury?

THE COURT: Show it to them, [113] certainly.

THE WITNESS: This is a photograph of Mr. Nesbitt at the time of the autopsy. As you can see, there are multiple gunshot wounds. There was a total of eight separate gunshot wounds to the thorax or to the torso and extremities. Looking at the photograph and referring to the diagram here – may I stand, please.

THE COURT: You may.

THE WITNESS: Thank you, sir.

THE COURT: Do you have a pointer for her?

We have a laser pointer there, if you would like to use it, I think.

THE WITNESS: I don't see it, sir. I think I can do it with my finger without too much trouble.

As I stated, there were eight separate gunshot wounds, and I'll try to go through them in order. I labeled these gunshot wounds one through eight, not because I know exactly which one came first, but in order to keep track of the entrance wound, the corresponding exit or the corresponding bullet. Some bullets exited the body, re-entered. So in order to keep track of [114] everything, and we know which bullet goes with which exit and so on, I numbered them one through eight.

Referring to the photograph and the diagram, I list gunshot wound number one to the left upper abdomen, and that is located here on the photograph and here on the diagram (indicating). All the entrances are marked in pink. All the exits are marked in green. The bullets that exited and re-entered the body, the re-entries are marked with orange.

So if we look at this, this is the entrance wound, gunshot wound number one, the exit is adjacent, right next to it, and there is a bruise, which is the hatch mark in between the two of the skin. So it entered here, exited here (indicating). That bullet perforated only the subcutaneous tissues. It did not actually penetrate the abdomen or perforate any major organs.

The second gunshot wound, the one I labeled number two, is to the left lateral chest. That's located here

on the diagram and here on Mr. Nesbitt's body (indicating). That bullet produced lethal injury, entering the chest cavity, perforating the left lung, the heart, the right lung, and the bullet then exited the left [115] hemithorax – the right hemithorax, the right side of the body, and the chest wall. So that bullet exited here (indicating). Entered here, perforated both lungs and the heart, exited here (indicating).

That bullet then re-entered the body in the orange hole into Mr. Nesbitt's arm. The bullet perforated his arm, and the bullet was recovered here (indicating). That bullet went from the entire left side of his body across both lungs and the heart, exited the body here (indicating), re-entered in the arm and the bullet was recovered from the arm.

Gunshot wound number three, we can see the entrance wound located here on this photograph, and here on the diagram (indicating). So it's a little more posterior than number two.

Looking at the next photograph, 43-B, we can see the entrance wound located here (indicating), almost behind the arm as shown in that diagram. That bullet produced injury to the left hemithorax, and entered the chest wall, perforated the aorta, which is the largest blood vessel in the body, that's the blood vessel that takes blood from the heart to all the major organs, and it's about the diameter of my two fingers. So it perforated [116] that very large blood vessel, and the right lung. It exited the hemithorax and the skin of the right lateral back, so the bullet then exited here (indicating). Traveled through the chest and exited here (indicating).

On 43-C, we can see some of these a little better. We can see the entrance and exit from gunshot wound number one adjacent to each other with the bruise in between that I described earlier.

Here is gunshot wound number two entrance wound (indicating).

Now, moving on to gunshot wound number four to the left forearm. That bullet entered the body here (indicating), it exited the body here (indicating), and then it re-entered the body in the abdomen. And what we see here, using the photograph, is we see the entry wound here on the forearm. That's 43-A. On 43-B, we see the bullet entering, exiting the forearm and re-entering the abdomen.

BY MS. ADDISON:

Q Excuse me one moment, Doctor Bush. Explain how you determine whether something is an entry or an exit or a re-entry?

A Certainly. Gunshot wounds to the [117] skin have certain characteristics. Entrance wounds tend to be round or oval. They also tend to have what's called an abrasion collar or abrasion margin. And what that refers to as – is when the bullet enters the body, it's traveling in a spiral like this (demonstrating), sort of like a football does when it's thrown. And when it hits the skin, as it goes in, it grinds the skin as it enters. So it punches a hole in the skin but grinds the skin around the hole leaving a little rough collar or rough edge around the bullet wound. So they are round to oval with an abrasion ring or collar.

Exit wounds, on the other hand, have no abrasion collar. Generally speaking, they can be unusual in shape, slit like, have a torn appearance, that type of thing. They also – when you look under the microscope, you can look at the tissues under the microscope and see the tissues being pushed in. You can also find fibers from clothing in the entrance wound side, whereas the exit would be free of that.

Re-entry wounds are a little different. As I said, when bullets are fired they travel in a spiral until they hit something. Once they hit something, whether it be something in the [118] environment, let's say a stop sign or through a piece of glass or something in the body, it knocks them off their nice spin and they start tumbling irregularly. When they re-enter the body then, they don't have a nice, round hole with a nice, little abrasion margin around them, since the bullet's tumbling and not spinning and grinding, it tends to make large, irregular entrance wounds. The abrasions around the entrance wounds are large and irregular.

So that's how we tell the difference, by using those features.

This photograph, I believe I was speaking about 43-B, shows the bullet entering, exiting and re-entering the body. Looking at the diagram when you get a close-up look, you can see that the hole is larger and there is a very large irregular marginal abrasion on that wound.

Gunshot wound number four, after perforating the arm and re-entering the abdomen, the bullet traveled through the abdomen and contuses or bruises the colon, it then transects the right iliac artery and the right iliacus

muscle. And what that refers to is the iliac artery is the artery – once the aorta comes down here it splits into two pieces, [119] one to the right leg, one to the left leg. The right iliac artery is the right-side artery that takes blood from the abdomen into the leg, and it's about the size of my finger in diameter. So it's a pretty large blood vessel. So the bullet transected that artery. The bullet was recovered from the tissues of the right lateral abdomen, and that would be here (indicating). So the bullet perforated the iliac artery and came to rest in the right lateral abdomen.

The next gunshot wound, gunshot wound number five, is located here on the upper arm, the left upper arm (indicating). We can see that wound here on 43-B. We can also see it again on 43-A, located right here (indicating). So that bullet is in the – the entrance wound is in the left upper arm. That bullet, number five, exits the medial left upper arm and produced no injury to vital structures. So that bullet passed through soft tissues and did not produce any significant injury.

Just to show you the location of the bullets that I've already described, I described a bullet being recovered from the arm, number two, and one from the right lateral abdomen, number four. [120] Those bullets I marked with an X because they were right under the skin and I could feel them. So those are the locations marked with X on Mr. Nesbitt's body where those bullets were actually recovered.

The wound, number five to the left upper arm, as I said, perforated only the soft tissues of the arm. It did not produce vital injury.

Number six to the dorsal left hand, we can see that injury in 43-C with the gunshot entering here (indicating) and exiting adjacent. So we see the entrance and exit very well on this photograph right in the dorsal hand. Again, no injury to vital structures, no large arteries or any organs injured on that wound.

Number seven to the right arm, the bullet perforated the soft tissues and muscles of the arm but produced no injury to vital structures before it exited. That bullet wound – on this photograph, we see that on the right arm. This would be the entrance wound here below the elbow on the right arm (indicating) and then the bullet exited a little higher up on the right arm in the back. So it entered here (indicating). And this is [121] the body face-down, and exited slightly above. So it entered below the elbow and exited above the elbow.

THE COURT: What number is that, please?

THE WITNESS: Sir, that is 43-H.

THE COURT: Thank you.

THE WITNESS: Okay. Now, moving on to gunshot wound number eight to the right anterior thigh, that bullet entered the anterior portion or front portion of the right thigh. It traveled left to right perforating the muscle and soft tissue of the thigh, entering here, exiting here (indicating). Again, there were no injuries to vital structures. And this is the photograph, a close-up of the entrance wound, and that is photo number 43-E showing the entrance wound in the thigh anteriorly near the groin.

One photograph we didn't look at was 43-D. And this photograph is just showing the exit and re-entry of

the bullet number two, where it exited the forearm and re-entered the chest.

And lastly, 43-G – in addition to the gunshot wounds, Mr. Nesbitt had lots of scrapes which are in medical terminology called abrasions. Abrasions are scrapes or results of falling on a [122] rough object or having a rough object rubbed against you or struck with a rough object. Most of us are most familiar with children falling on pavement outside on the street and they get a little scrape on their knee. Well, it's the same sort of situation here, the top layer of skin is just rubbed off by scraping against a rough object or, as I said, a rough object scraping against the skin. And we see multiple abrasions on his face, or skin scrapes on his face, including a fairly large linear, or meaning a line like one on the right forehead.

BY MS. ADDISON:

Q Is there a distinction, Doctor Bush, between abrasions and scrapings, as you see there, and injury that results from a blunt force?

A They will appear the same. So there would be no difference looking at the wound itself. They would appear the same. Because they are produced by similar mechanism. The rough object scraping against the skin or the skin scraping against a rough object. So they are produced in the same fashion, and I really can't tell one from the other with any certainty.

Q You mentioned, I believe, there [123] were three gunshot wounds that produced lethal injury, is that correct?

A Yes, ma'am, that's correct.

Q And which three were those again?

A The three gunshot wounds that produced lethal injury were the ones that actually penetrated the abdominal and chest cavities, and those included number two, which was to the left chest that traveled through the body perforating both lungs and the heart. That's the one that re-entered the arm and the bullet was recovered from the arm.

Gunshot wound number three to the left lateral back, which is shown there in the lateral aspect up here, the pink one, in a straight line to the left of the back. That bullet perforated the right lung and the aorta, the largest blood vessel in the body. That bullet exited the skin and was not recovered at autopsy.

Then gunshot wound number four, which perforated the arm and then re-entered the abdomen with the large re-entry on the lower abdominal wall, that bullet perforated the iliac artery, which, again, was the large artery running through the lower abdomen and groin area.

[124] So those three wounds would have produced lethal injury. Had he only received one of those three, he could have died from any one of those three. But the combination certainly of the three was lethal.

Q And are you familiar with the term defensive injuries?

A Yes, ma'am, I am.

Q Can you explain what that is to the jury.

A Defensive injuries are injuries – generally they'll be scrapes or abrasions or they can be bruises, contusions, or they can also be knife wounds or gunshot wounds. What that refers to is they are placed – the injuries are located on areas of the body that may be used in a defensive manner. For example, if somebody is coming at you with a knife, you may raise your arms in order to block a blow. If you are on the ground you, may raise your legs in an attempt to shield the vital parts of your body, your head and abdomen from some sort of assault.

So defensive injuries are any injuries on the outer aspects of the arms and hands and also can be on the legs that indicate the person [125] may have put up a struggle, put up a defensive sort of move by putting their arms, as I said, or legs over the vital areas of the body, the head and abdomen.

Q And in your autopsy on Mr. Nesbitt, did you find any defensive injuries?

A No, ma'am, there were nothing that were characteristic of defense wounds other than maybe the gunshot wound to the hand and forearm, if he was possibly putting them up. But there were no scrapes or bruises on the aspects of the arms or hands, only the gunshot wounds through the arms and hands which could certainly be as a result of putting an arm or hand up.

Q You've described the injury to each organ of each of those three lethal gunshots. Can you describe for the jury the effect that those gunshot wounds would have on a person?

A Yes, ma'am. All three of those gunshot wounds would produce profuse bleeding. Certainly the one through the heart and the aorta the most bleeding. And the ones through the lungs, since the lungs are basically air-filled bags supported by blood and fibrous tissue cause extensive bleeding, also.

[126] None of these wounds were immediately lethal. None of them perforated a portion of the brain called the brain stem, which would produce immediate death. So these injuries would have been incapacitating. They would be painful. He may have survived for several minutes prior to dying from basically bleeding to death internally from the wounds.

Q Would he have been able to move at all during that time?

A Yes, ma'am, there is – none of these injuries would have caused him to be immediately unconscious or caused him to be paralyzed in any way. So, yes, he would be able to move for some period of time prior to lapsing into unconsciousness from loss of blood.

Q And you said there is no way to know which of these shots was first and which was last?

A No, ma'am, I can't tell.

Q Even if assuming one of these three lethal shots was first, can you approximate how long he would have lived or remained conscious?

A Well, it's certainly variable. He certainly could have remained conscious for several [127] minutes, though it certainly could be shorter. I really can't say. But

the most would be a few minutes; at the very least a few moments.

MS. ADDISON: Thank you.

Your Honor, I would move to admit each of the exhibits that Doctor Bush has used, 42, 43-A through H, 44, 45. She may not have identified the toxicology report.

THE COURT: We have that in. It's already been introduced.

MR. ROGERS: That's already been introduced and no objection to the other exhibits as presented by the Commonwealth.

THE COURT: All right. Make that 43-A through H part of the record and 44, the diagram, as part of the record, without objection. All right.

(Commonwealth's Exhibits Number 43-A through Hand 44 were received in evidence.)

MS. ADDISON: If I might see – the Clerk has one more we probably should have used.

MR. ROGERS: Uh-huh.

MS. ADDISON: Ask if Doctor Bush can identify that. It might be similar to one [128] that's in the other packet she described.

THE WITNESS: Yes, ma'am, this is Exhibit 9. I believe I mentioned earlier, I think the last photograph I showed in the series showed injuries – it may be in a slightly different angle, but it's the same injury, with numerous scrapes or abrasions present on the head, including a fairly large one here in the forehead near the hairline.

MS. ADDISON: I would move to admit Exhibit 9, your Honor.

MR. ROGERS: No objection, your Honor.

THE COURT: All right. Mark it Exhibit Number 9, make it part of the evidence and the record in the case.

(Commonwealth's Exhibit Number 9 was received in evidence.)

MS. ADDISON: I have no further questions of Doctor Bush.

THE COURT: Your witness.

MR. ROGERS: If the Court please, Defense has no questions of Doctor Bush. And she can be excused.

THE COURT: Thank you, Doctor

* * *

[Entry Of Disposition Orders From Priors]

[136] convictions.

Again, we have provided the Court with a copy.

THE COURT: Are they to be marked separately, do you want them or not, the sentencing order?

MS. ADDISON: They are disposition orders. They can be marked as B and C, your Honor.

THE COURT: Okay.

MR. ROGERS: We don't have objection to that, if the Court please.

THE COURT: All right. So marked and made part of the record and the evidence in the case.

(Commonwealth's Exhibits Number 73-A, B and C were received in evidence.)

MS. ADDISON: Commonwealth would call Dennis Tuinei.

THE CLERK: Dennis Tuinei, come into the Courtroom, please. Dennis Tuinei.

---

[138] Dennis Tuinei

* * *

Stoops, John Hultquist and Scott Thompson.

Q And approximately what time was that?

A It was around midnight.

Q And what were you doing there?

A Using the pay phone.

Q And did you have occasion at that time to come in contact with the Defendant in this matter, Daryl Atkins?

A I sure did.

Q And can you describe for the jury what happened?

A Yeah. I was waiting for my friend to get off the pay phone when three black gentlemen approached us.

They were just standing there at first, and we thought they were there to use the phone. We got off the phone and went back to our car, and someone said, "Don't get in the car yet." And we turned around, and one of them had a gun pointed at us. And then they told us to get on the ground and put the gun in my back.

And then he went – Mr. Atkins went up to me and went through my pockets and through my shirt and took my pager and five dollars, and then he went around to the rest of my friends. [139] Then after he was done, he came back to me and stood over me for a little bit and looked at me. I looked back up at him. He said, "What the fuck you looking at?" I didn't say anything. It was pretty obvious what I was looking, at, it was him. And then he hit me in the back of the head with a bottle.

Q Did you have any injuries as a result of that?

A No, huh-uh, as a matter of fact, the bottle hit me in the back of the head and bounced off. And then after that, I went to engage him in hand-to-hand combat and he ran.

MS. ADDISON: Answer any questions that Mr. Rogers may have.

MR. ROGERS: Thank you, Madam Commonwealth.

CROSS-EXAMINATION

BY MR. ROGERS:

Q Mr. Tuinei?

A Tuinei.

Q Excuse me. I'm sorry. Tuinei. Okay. Daryl Atkins was not the one with the gun?

A No, he wasn't.

* * *

---

[143] Shane Stoops

A We were at the pay phone at Almost-a-Bank. And we were on the phone, and we were all standing outside the car waiting for my friend to get off the phone. And we were approached by – well, there was three, and a guy standing over at the corner by the car. They came up and they asked if we were done with the phone. So we were like, almost, you know.

So my friend hangs up the phone when he was done, and he started to turn around, and one of the guys pulled a gun out and he was like, "You know what this is, you know what this is." So, you know, I backed up a little bit. And they came up and got my wallet.

And Dennis and Jeremy were on the other side of the car. And that's where Mr. Atkins was. And they took my money and everything, and I was sitting there looking around.

And they had Dennis on the ground. And he told Dennis not to look, "Don't look at me." Dennis looked back up, and he hit him in the head with a bottle. And then Dennis jumped up, and he ran off.

Q How much money was taken from you?

A From me, about ninety dollars.

* * *

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[146] John C. Hultquist

* * *

Scott Thompson.

Q And on that particular evening, did you come in contact with the Defendant in this matter, Daryl Atkins?

A Yes, ma'am.

Q And can you describe for the jury what happened?

A My friends and I stopped to use the pay phone at that Almost-a-Bank, and we were approached by three males. And they had surrounded us at the phone, I mean – yeah, at the pay phone, and then we had asked if they needed to use the phone, and they sort of said yeah, you know. So we got off the phone and proceeded to get in my car, and that's when they told us to stop, you know, and get on the ground. And that was it.

Q And what happened after you got on the ground?

A Then they, you know, took our wallets. And – and then I saw the Defendant hit my friend Dennis on the head with a bottle of some sort.

Q And how much money was taken from you?

A From me?

* * *

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[155] Kevin Phillips

Q Mr. Phillips, how are you employed?

A I am a jail officer in Portsmouth.

Q Okay. And directing your attention to June of 1996, how were you employed then?

A I was a delivery driver for Chanello's Pizza.

Q And specifically June 28th of 1996 were you still employed and working?

A Yes.

Q Did you on that evening have contact with the Defendant in this matter, Daryl Atkins?

A Yes, I did.

Q Describe for the jury, please, what happened that night.

A I had just gotten off work and they asked me to deliver one more run. So I took it to a house on Sacramento. I was instructed by my employer that if everything looked good to go ahead and deliver it, because they had had some problems.

When I got to the house, there was a man standing between the screen door and the wooden door of the house waving me down to come in.

* * *

[161] MR. ROGERS: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. ROGERS:

Q Mr. Phillips, this was on June 28th of 1996?

A Yes.

Q Okay. And you said that there were four men involved in this robbery deal, is that correct?

A Correct.

Q And I believe your testimony was that there was one individual with a gun, isn't that true?

A Correct.

Q Okay. And that individual was not Daryl Atkins, was it?

A No.

Q Now, the man with the gun, who was not Daryl Atkins, was a passenger in the car?

A Correct.

Q How many people were in the car with you on the drive from the apartment area over

* * *

No. 00-8452

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

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[164] Amanda Hamlin

* * *

Atkins, at that time?

A Yes, I did.

Q Would you describe for the jury, please, what happened.

A I had just finished cutting my grass. And I have a riding lawn mower, and I was backing into my shed in the back of my house. And as I turned my head around like this (indicating), when I was backing around, before I came back around, he slapped the gun up against my face. And I forget what dialogue took place, but that was when I first came in contact with him.

Q And was he facing you or behind you at that time?

A To the side.

Q Okay. What happened after he slapped the gun against the side of your head?

A He told me to get off the lawn mower. And my foot got caught some kind of way. So he came around to this side of me and helped me to get my foot out. And after that, I stepped down on the ground, out of the house down on the ground, and he caught me by the shirt that I had on and led me around to the front of my house.

Q Where was the gun at that time?

[165] A I don't remember. Maybe I just – I don't know, I just don't remember seeing the gun then.

Q Did you have any sense that it had been put away?

A No, I just –

MR. ROGERS: If your Honor please, I object to the form of the question. Counsel knows better than that.

THE COURT: Sustained. Rephrase the question.

BY MS. ADDISON:

Q When you got around to the front of the house, Ms. Hamlin, what happened then?

A We were standing in front of my den window, and he took the gun and hit me in my head and knocked me down to the ground.

Q And what happened after that?

A Then he, some kind of way, he assisted me in getting up off the ground. And after that, he started to go up my driveway like he was leaving. And I started to walking towards my door to go in the house. But I was afraid to run because I was afraid that maybe he would turn around and look at me and see me and shoot me for running.

[166] So I went to the other side – we had two cars in the driveway, I went to the side of the other car and I was just standing there. And he went up the driveway and came back around and put the gun to my stomach and shot me.

Q What happened after that, Ms. Hamlin?

A I don't even remember him leaving. I know he did. I went up on the porch and knocked on the door.

And I told my daughter to call 911. And I just laid down on the front porch, and I told her not to come out of the house because I didn't know where he was.

And the next thing I know the ambulance was there and there were a lot of people there. Evidently I passed out. I don't know what happened.

Q And describe, if you would, what medical treatment you received after that?

A I was in the hospital, at Riverside Hospital for 21 days. As a result of the gunshot wound, I received a colostomy.

Q Any other surgeries after your 21-day hospital visit?

A I went back in March of 1997 and I

* * *

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[Defense Proffer Re: Atkins' Admissions]

[182] would expect Investigator Lyons to give in answer to Mr. Rogers' question, is going to be he partially confessed. He admitted to some part of it. It's going to elicit that denial, which is exactly what this Court has ordered not be presented to this jury.

THE COURT: The Court stands by its ruling, Mr. Rogers.

MR. ROGERS: Note exception, if the Court please.

Let me make one other proffer that I intended to go further with Investigator Lyons on. And I would make a proffer that based on the testimony of Detective Lyons in the Hampton Circuit Court, Part Two, done on March the 7th, 1997, before the Honorable Judge Walter J. Ford of that Court, Detective Lyons testified in that case that he was present when the Defendant admitted his involvement in the crimes in Hampton, all of which have been put in evidence as to the orders of conviction and which the Commonwealth has elicited the complainants from those cases.

If the Court please, on that same basis and in that case, all those cases in Hampton, which took part in the springtime before this case

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[187] Phillip Atkins

A Yes, ever since 1985.

Q All right. Okay. And she has remarried?

A Yes, sir.

Q Now, Mr. Atkins, how many children did you and the present Ms. Bullock have?

A We had one child, that was Daryl.

Q And Daryl Renard Atkins is who you are referring to, who's seated here in the Courtroom?

A Yes, sir.

Q And he's your son?

A Yes, sir.

Q He is the only child of your marriage with the present Ms. Bullock?

A Yes, sir. Daryl is my only child.

Q What year was he born, Mr. Atkins?

A Daryl was born in 1977.

Q And do you remember what date in '77?

A November the 6th.

Q Where was he born?

A He was born in Hampton, at the Mary Immaculate – old Mary Immaculate Hospital.

Q And where did you and the family [188] live after his birth?

A We had stayed at the – it's apartments, Glen Garden Apartments in Hampton. We stayed there for about eight years of our marriage.

Q Okay. And at the time that you and your wife separated and got the divorce in 1985, who got custody of Daryl?

A His mother had custody of him.

Q And where was she living at that time?

A She was living in Hampton at Coliseum Apartments, where I'm staying at now. She was down – further down, Coliseum Apartments in Hampton.

Q And did you have visitation in the divorce with your son, Daryl?

A Yes, we had an out-of-court settlement and everything, and we had – I had visiting rights and everything. Both lawyers got together, and we had an agreement and how much I'll pay on child support and visitation rights.

Q In what school systems did Daryl go to school when he got old enough?

A Well, he started at a day care center, Ivy Baptist Church, he had started there as [189] a day care center, and he went down to Aberdeen School, and from there to Bethel – Bethel High School.

Q Okay. Did he graduate from Bethel High School?

A No, sir.

Q How did Daryl do in school as he was coming along?

A Well, he was – we had sent him down to Buckroe Beach because of his – his grades. He was falling – he was falling behind at Bethel, Bethel High School, so we had sent him down to Bayside Beach so they could help him more. And –

Q Was that the skill center, part of the Hampton Public School System?

A Yes, that was the skill center.

Q And that's for those who have difficulty in school and are not accomplishing their work?

A Yes, sir.

MS. ADDISON: Your Honor, I would ask that the questions not be leading.

MR. ROGERS: I apologize.

THE COURT: Rephrase the question.

BY MR. ROGERS:

[190] Q Mr. Atkins, were you aware at a time when Daryl was a juvenile when he got in trouble with the Court system?

A Will you rephrase that again, please.

Q Were you aware of a time when Daryl was a teenager, a young teenager, that he got in trouble with the Court system?

A Yes, sir.

Q And were you notified to go to Juvenile Court with him?

A Yes, sir.

Q Okay. After that, did – did he continue to be in the custody of his mother, your ex-wife, Ms. Bullock?

A Yes, sir, at that time he still was in custody with his mother.

Q Now, did custody – strike that. Was there ever a time when Daryl came to live with you?

A Yes, I would pick him up, like, on – by working at the shipyard all the time and a lot of times on weekends and stuff, I'll pick up Daryl and we spend as much time as we can together. But Daryl, I think, when he was ten –

well, you [191] see, Daryl was right upset when we got our divorce.

It kind of – I always thought that it was the parents was the ones that gets hurt a lot in divorce and everything, but Daryl always kind of took it kind of hard. And he never was the same. He always wanted to be with his mother and he always wanted to be with his father. So we kind of – kind of worked things out, but still Daryl was – I guess he still kind of missing, he still was kind of upset over this, over the divorce and everything.

Q Now, Mr. Atkins, directing your attention, sir, to the summertime – spring or summertime of 1996, before that time, where had Daryl been living?

A Oh, he was living with his mother.

Q Okay. And was there any change in where he was living in the spring or early summer of 1996?

A Yes, he came and I – at the time, he was – he was staying with his mother, so I – at the time they kind of got a little upset, you know, with each other, so he came and stayed with me for that length of time.

Q So that was in the spring or [192] summer of 1996?

A Yes, sir.

Q Who else was living there, if anyone, with you and Daryl?

A It was just me and Daryl.

Q And you were working at the shipyard?

A Yes.

Q What shift did you work?

A I was working the second shift, from four to 12.

Q Okay. Four in the afternoon to midnight?

A Yes.

Q Okay. During the time when Daryl moved to you during that spring or summer of 1996, was he working?

A No, I had him – I took Daryl – well, he couldn't graduate, he had enough grades, it would cost me quite much to try to get him to graduate, the courses at the Bethel High School. So we took him – I took him down to the lady down at the – the guidance counsel lady fixed things up downtown Hampton that he could get a GED. So that's when I start taking him – and all – sometimes he

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[194] Sussex State Prison, in Waverly, Virginia.

Q Okay. And are you able to visit him there?

A Yes.

Q What is the – explain to the ladies and gentlemen of the jury what the procedure is for you to visit your son up there at Sussex prison outside of Waverly.

A Well, it took – well, it took a long time for the state to approve us, almost – I guess it was almost a year for them to approve us. So finally we got a chance to see him.

Q When you say we, who are you referring to?

A Me and my mother.

Q Your mother's name is?

A Ms. Virginia Atkins.

Q Now, how often are you able to see Daryl?

A Well, we see him about – since the four months that I described to you, I have been seeing him about every week, every weekend, every Saturday. But other times before that, four months ago, we used to see him every two weeks, every Saturday, most times visit be on a Saturday.

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[199] A Yes, he was with me when he was serving his weekends in jail.

Q And he was with you in April of 1996?

A I don't know. I don't know the month.

Q You're not sure. What about June of 1996, was he living with you by that time?

A I guess Daryl was with me – I know he was with me about a couple – I guess about three or four months before all of this had happened.

Q You said he got arrested in August of 1996, so would he have been living with you two months before?

A Two months, something like that, I guess, two or three months, my guess.

Q Okay. So you had absolutely no idea what kind of things he was up to in all of those Hampton cases?

A No, I didn't.

Q Did you see anything that gave you reason to worry about what he was doing?

A Well, that was – Daryl was always, like you say, a follower, and I had problems [200] with, at that time, William Jones. I just couldn't get him to stay from around my apartment.

Q Uh-huh. But you didn't have any idea that he was committing all of these crimes during that time?

A No, huh-uh.

MS. ADDISON: I have no further questions, your Honor.

THE COURT: All right.

Mr. Atkins, thank you for coming. You can have a seat in the Courtroom or you're free to leave.

THE WITNESS: Yes, sir. Thank you.

MR. ROGERS: Call Virginia Atkins.

THE COURT: Wait just a moment, please before you call her in.

We have been graded by a distinguished presence of a gentleman by the name of Harold Baumus.

Mr. Baumus, the Court would like to welcome you to the York Circuit Court.

Mr. Baumus is a distinguished citizen of Virginia. He's the retired Executive Secretary of the Virginia Municipal League, served in that capacity for some five

decades, from the [201] '30s through the '70s. He is 93 years young.

Among his other accomplishments are the fact that he fathered two daughters that I know of, Barbara and Nancy. Nancy Kane, the Clerk of this Court, is also his daughter. She's seated back there beside him.

Welcome, sir.

MR. BAUMUS: Thank you, your Honor.

THE COURT: Virginia Atkins, please.

THE CLERK: Virginia Atkins, come into the Courtroom, please. Virginia Atkins.

THE COURT: Ms. Atkins, if you'll come to the witness stand, please, up that ramp.

VIRGINIA BANKS ATKINS,

called as a witness by the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[202] BY MR. ROGERS:

Q State your name, please, ma'am.

A My name is Virginia Banks Atkins.

Q And, Ms. Atkins, I know it's not a very gentlemanly thing for me to do, but under the circumstances

and the location and with the example of the gentleman who was just graciously introduced by this Court, how old are you, ma'am?

A I'm 55, soon be 56.

Q What relation are you to Daryl Atkins, the Defendant in this matter?

A I'm Daryl Atkins step-grandmother.

Q So have you known him all of his life?

A Just about. I think he was three-and-a-half or four, something like that.

Q Ms. Atkins, you were aware that Daryl was locked up back in the summer in August of 1996 as a result of the case that we're in Court today on?

A Yes, sir.

Q Has he been out of jail since that time?

A Not as I knows of.

If he had been out, would you have [203] known it?

A Yes, sir.

Q Okay. So he has not been out of jail since then?

A I don't – I can't recall. I don't think so.

Q Okay. How often do you see Daryl, Ms. Atkins?

A I try to see Daryl at least three times a month.

Q Okay. And do you go up with anybody to visit him over at Sussex Prison in Waverly, Virginia?

A Yes, I go with my stepson, Phillip, Junior.

Q Okay. Phillip Atkins, Junior, is your stepson?

A Yes, sir.

Q Okay. And he's Daryl's father?

A Yes, sir.

Q Ms. Atkins, the Commonwealth asked a similar question of Phillip, Junior, did you have any idea or see any signs that Daryl, in the summer of 1996, early '96 through the summer of 1996, was getting involved in all of this criminal activity?

[204] A No, sir, not at all.

Q During that time period, do you know where Daryl was living?

A In 1996, if I'm not mistaken, I think he was living with his mother.

Q Was there a time in that year of 1996 that he went to live with his father, Phillip?

A In '96? Now that I can't recall. I don't think so. But I'm not recalling.

Q You do remember when he was arrested on this charge in York County, is that right?

A Yes, sir, I was devastated.

Q Ms. Atkins, what – what effect has this had on you, ma'am, as his step-grandmother?

A Very hard. Very hard. I'm not a well person. And to see my grandson, you know, in such big trouble.

And may I also add something while I'm here. And to see the Nesbitt family in such distress. It really does something to my heart. And so right now I would just like to say to the Nesbitt family that anything that my grandson has done to cause you much pain, please accept my apologies, because it's been very hard on me, too. [205] It's really been hard.

Q Yes, ma'am. Mrs. Atkins, would – is religion an important part of your life?

A Very important. Very.

Q Are you a lady who prays?

A Yes, sir, every minute of the hour I'm praying.

Q And have your prayers not only been for the Nesbitt family but have they also been for your grandson, Daryl?

A Also for the Nesbitt family as well as for my grandson, and for the whole family, everybody that was involved, I've been praying, because I'm that type of a person.

Q Now, Ms. Atkins, you are aware, are you not, that the minimum that this jury can sentence Daryl to is life in prison without parole? Is that your understanding?

A Yes, sir, I think I heard that in Court yesterday, life without parole.

Q And you understand that means that under any circumstance he will never get out of prison so long as he lives, do you understand that?

A Yes, sir.

Q Do you have anything to say to the [206] ladies and gentlemen of the jury about what your requests would be as to their consideration of Daryl for the death penalty?

A Yes, sir, very much so.

Ladies and gentlemen of the jury, as I said, I'm Virginia Banks Atkins. But I am very sorry for what's happened, for whatever part my grandson played a part. But I ask you if you could just find in your heart to forgive Daryl for anything that he have done and to give him life without parole, I will be most gracious for your consideration. And I thank you all so very much.

MR. ROGERS: Thank you, Ms. Atkins. Answer any questions that the Commonwealth may have.

MS. ADDISON: Thank you.

CROSS-EXAMINATION

BY MS. ADDISON:

Q Good afternoon ma'am.

A Good afternoon.

Q You said that you have known Daryl since he was three-and-a-half or four years old?

A Yes, sir – I mean, yes, ma'am. [207] Excuse me.

Q Approximately how often did you see him when he was growing up?

A Well, I didn't see him that much unless his father brought him to the house. And my husband is a farmer –

and you didn't ask me, but I'm going to tell you how long I used to see him – my husband is a farmer, retired, but he was a farmer. Phillip, Junior used to come and help his father, and he used to bring Daryl over to me and Daryl used to spend some time with me.

Q And I believe it is true his parents separated and divorced in 1985, is that correct?

A Well, I'm afraid to say what year it was that they divorced because I really don't know what year.

Q Were you aware when that happened?

A Was I aware when that happened? Yes. Yes, uh-huh.

Q And were you aware where Daryl was living after his parents separated?

A Yes, if I'm not mistaken, I think he was living with his mother.

Q From that point on, how often did [208] you see him?

A Not too often. Not too often at all.

Q Can you give us an idea how many times a year or how many times a month?

A Maybe I see him about maybe once or twice a year.

Q Once or twice a year?

A Yes, ma'am.

Q Were you aware in 1991 when he got in trouble with the Court in Suffolk?

A In '91, I believe I heard his father say something about the situation.

Q But you didn't – you weren't personally involved or didn't talk to Daryl about it?

A No, ma'am.

Q What about in 1995 in Hampton, were you aware of him being involved with the Courts again?

A Not at all. I was not aware of that.

Q During that spring and summer of 1996, did you have any idea what kind of things he was involved in?

[209] A No. No.

Q Were you surprised by all of that, ma'am?

A I was devastated. I was very devastated by what condition or whatever he was involved in, very devastated.

MS. ADDISON: Thank you.

I have no further questions, your Honor.

MR. ROGERS: No additional questions. She can be excused.

THE COURT: Thank you, Ms. Adkins. [sic] You may have a seat in the Courtroom or you're free to leave.

MR. SAUNDERS: Call Doctor Evan Nelson, your Honor.

THE CLERK: Doctor Evan Nelson, come into the Courtroom, please. Doctor Evan Nelson.

THE COURT: Come to the stand, please, sir.

MR. SAUNDERS: There are some exhibits that are over here, your Honor.

THE COURT: All right. Are you going to need the – tripod?

[210] Testimony of Dr. Evan Nelson

MR. SAUNDERS: They have been previously marked 6 through 12, your Honor, Defense Exhibits 6 through 12.

THE COURT: All right.

DOCTOR EVAN STUART NELSON,

called as a witness by the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SAUNDERS:

Q Good afternoon. State your name for the Court.

A Good afternoon. I'm Doctor Evan Stuart Nelson.

Q And, Doctor Nelson, would you go into some of your educational background?

A Sure. I have a Ph.D. in clinical psychology, from the University of N. C., at Chapel Hill. I have an internship at the Indiana University School of Medicine in Indianapolis.

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[220] BY MR. SAUNDERS:

Q Doctor Nelson, did you have occasion to meet Mr. Atkins?

A Yes, I did.

Q What was the – that occasion?

A I was appointed by the Court, on motion of the Defense Attorneys, to evaluate him to assess the presence or absence of mitigating features; that is, things that would be relevant to this here, and advise Defense Counsel about things that might be relevant to mitigation and how to present them in Court.

Q Doctor Nelson, in order to do your job that you were appointed, what did you have to review?

A Well, forensic evaluations are different than psychotherapy. In psychotherapy, I take what the patient tells me up front as their perspective, as valid, not going to spend time saying, "Okay, I want to call your spouse to verify your version of events." But in a forensic evaluation, as compared to psychotherapy, or an intake, the goal is to look at a broad tapestry of information and integrate it.

So the Defendant's self-report is [221] one piece of information, but then you have to look at lots of other things. In this case I was able to look at lots of information related to this offense, information related to his prior convictions, to be able to look at school records, psychological test data and speak with family members.

Q As far as the school records report is concerned, how far back do those school records go, Doctor?

A Oh, all the way back to – I've forgotten if it's kindergarten or first grade.

Q Have you reviewed those yourself?

A Yes.

Q And did you administer any types of tests?

A Yes, I did.

Q What types of tests?

A I gave him an IQ test, something known as the WAIS-III Intelligence Test.

Q Doctor, why did you use that particular test?

A Well, the WAIS-III, which stands for Wechsler, W-E-C-H-S-L-E-R – excuse me, W-E-S-C-H-L-E-R Adult Intelligence Scale, dash, Roman Numeral III, the WAIS-III is considered a [222] standardized IQ test. There are a number of IQ tests on the market. Some of them are for special niches of population. But the WAIS is one of the two that is recognized throughout the United States as a standard for assessing intelligence.

It's the one that's most frequently cited, for example, in state laws for identifying who qualifies for a learning disability or a mental retardation, the one that's most often cited in Federal disability laws for making determinations involving an IQ or neurologic deficits.

Q You said it's one of two tests that is standard, recognized as standard. What's the name of the other one?

A The other test for adults is the Stanford-Binet, S-T-A-N-F-O-R-D – B-I-N-E-T. And this is a test that's just used less commonly for a variety of reasons. But it's also widely recognized as a standard test for assessing IQ in adults.

Q The test that you administered, I notice it has a three. Were there any prior versions of that test?

A Absolutely. This test was originally developed in the 1940s. It was replaced

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[225] ethics and incorporate some specific requirements for forensics as well as requirements for testing. Also, the American Psychology Law Society, that I belong to, has a specific set of ethical guidelines, too, on how to practice forensics.

Q Anything in connection with the use of tests that you're supposed to do?

A Absolutely. There are ethical standards about using contemporary tests, knowing the norms, using tests in accordance with the rules and how they were developed, and limiting your conclusions to the scope of what a test can accurately assess. If you deviate from the rules of how to do the test, then you no longer have a test that really has any validity.

Q Doctor, in administering the test that you did give, are there any – do you have any charts for all this?

A I do. If you'll give me a second, I'll be able to tell you.

Here we go.

Q Doctor, would you look on the back and tell us the exhibit – excuse me, it's on the front, which exhibit is that?

A Defense Exhibit 6.

[226] Q All right. And could you explain to us what this is?

A This essentially summarizes what I was just saying. In order to develop the IQ test, it's developed on 2,450 adults. It's not just given to one or two people. And there is an effort made to give it a broad range of ages and to match it to the U. S. Census. It wouldn't make sense, for example, just to give this to inner city African-Americans in Norfolk and say that represents an average for the entire society. So there's an effort to sample in proportion to the numbers of whites, blacks, males, females, Hispanics, some of the special populations or oversample, but we don't need to get into worrying about that. There are 200 additional African-Americans and Hispanics in order to do this, but that's a complicated statistical issue.

It measures IQ from 45 to 155. One hundred is the average. Now, how did we get that? That's essentially a magical number. They took the average number of answers and said that's a hundred and everything else is scored off of that, either above or below.

And most importantly, there are [227] very standardized rules for how you give this test. And the reason is that if you don't have that, you can't say that a psychologist in one state is getting the same results as a

psychologist in another state either for two different people that you're trying to say are comparable levels of IQ, or for the same person who might be retested at another time. Without those standardized rules, folks would get any score because they would all approach it in a different way.

Q All right. Doctor, now, you administered this test, you followed the rules?

A Yes.

Q Now, for a moment. This manual here?

A Yes, that's the Administration and Scoring Manuel [sic] for the WAIS-III.

Q In order to administer the test correctly, you have to follow each of the procedures in this book?

A Yes.

Q Are there subsections of this test?

A There are actually – well, there are a maximum of 16 subsections. There are 13 major [228] subsections, and 11 or 12 that you'd administer to almost everyone. There's a lot of different parts, and each part may have a different type of task for the person to do.

Q How many of those subsections did you administer to Daryl?

A I gave him all 13 of the major subsections.

Q All 13 of them?

A Uh-huh.

Q And would you explain some of the rules about how you can give this test to an individual?

A Sure. And I actually have a chart to help explain some of that. This one doesn't seem to be marked.

Q I think it's on the back.

A It is marked on the back. Defense Exhibit Number 7.

I need to tell you that in order to keep this test secure, that is, not to give away the answers of the teachers' guide, these are make-believe items that I'm putting up to show you, because I never know if one of you is going to need to take this test or one of your children. So with [229] due respect, this is a make-believe item.

There are really two general groups of questions, ones that are verbal and ones that involve some sort of performance. The verbal questions are often things like defining a vocabulary word or knowing information about the world.

So, for example, the question might be, how many eggs are there in one dozen eggs. A simple answer. You either say 12 or anything else is wrong. Score it a zero if they say anything else, and a one for 12. Some items allow you to score more than one possible point, depending on how correct it might be.

For example, what is the thing to do if a water pipe breaks in your house? A zero-point answer would be get a mop, because that's not really going to address the issue. A one-point answer might be call a plumber. That's a good thing to do. A two-point answer would be turn off

the main water valve and then call the plumber. Clearly, that's the most sensible answer. So there's three points there.

Depending on where you are in the test, there may be a rule about whether or not you [230] can ask the person, yes, calling the plumber is a good idea, but would you do something else first? In other places, you are not allowed to prompt. Again, as part of the standardization, everybody has to follow the same rules or you can get a different answer. If I decide that I like this guy and, therefore, I want to keep asking more questions, well, calling a plumber is a good idea, but give me another answer. What would be a better thing to do?

I can falsely inflate the IQ test. If I decide that I don't want to provide those inquiries, and the manual actually gives you guidelines about where you should inquire and where you shouldn't ask for more information, then I can deflate someone's IQ.

The other group of questions are performance questions. This is a make-believe matrix here. You see the box on the left-hand side has a pattern and a question mark. The question is which one of the symbols to the right of that should go in where the question mark is to complete the pattern? On the top there is an empty square and then a grayed-in square. On the bottom there is an empty arrow shape and then the question mark. There is only one correct answer here, and the answer is [231] the shaded arrow from the right that was the second or middle picture is the one that should go in for the question mark.

Some of these questions may be timed. That is, the person may only have a limited amount of time to do it, perhaps 30 seconds to complete it. If they get it done in ten seconds, they get bonus points for doing it very quickly. If they get it done for between ten and 20 seconds, they get a few less points but they still get it. If they get it done from 20 to 30 seconds, they get even less points.

Again, standardization is important because if I want to keep giving somebody extra time they may get it beyond the time limit but it doesn't mean that they would get points. So that's an example of how this test works. And as I said, there are 13 major parts, and it can take anywhere from a little under an hour to almost two hours, depending on how many questions the person gets right.

Q Can you make a valid determination of an IQ by giving part of this – these tests?

A You can make an estimate of IQ by giving a few of the subtests but that's all it is, [232] is an estimate. When you think that a major issue like a neurological problem or a mental retardation, or the other way around, academically gifted, it's important, you have to give all of the parts, because somebody might just happen to do well on the one or two parts that you give but not do well or do very well overall.

Q The parts are broken down, is there more than one question to each part?

A Absolutely. Some of these parts have 20 and 30 questions. Some of them may only have five or six questions. So there's no way when someone is taking the test, for example, to say, well, I'm going to get the first five right every single time and then I'm going to lie about everything else after that, and think that they're going to get the right score at the end, because each question or each section is adjusted to recognize that there is a different number of questions for each one.

Q So what happens if you only ask one or two of those questions?

A Well, you don't have an idea about how somebody is overall. You know, somebody may miss two questions, then get two right, then miss [233] five more, then get one right. If you just ask one question in the middle, that doesn't tell you anything about how they are going to do for the whole scale.

Q Doctor, you administered these tests. What results did you arrive at?

A Daryl Atkins' full scale IQ is 59. And there are two sub IQs that come out of this that aren't really relevant here because we're not concerned about neurological types of difficulties. His verbal IQ is 64. And his performance IQ is 60. Actually, I have a chart of this. It would help you to track all the numbers.

This one is Defense Exhibit 12. What this is is a graph of the data. On the left-hand side are his verbal scales. And I know that from where you are sitting in the jury box you probably can't see all the different numbers and letters, and I'll describe it generally.

And on the right side is the performance scales. Underneath it says the full scale IQ is 59, and that places him in the first percentile compared to the nation. That is, if you took just a hundred people at random, one person would have a score of 59 or below. Okay? So it's a [234] very rare outcome in the population at large. And that's why it has a classification also of mentally retarded.

What you see from the scales being plotted there, the bars that are sticking up on the graph are how he did on each of these 13 subtests. And underneath are some letters that tell you the abbreviation for the name of each test. And what's important here in terms of why I said there are no neurological issues is, number one, we don't have any reason to be concerned about neurological issues for Daryl Atkins. There's no serious head injury. There's no history of behavior suggesting any sort of neurological problems.

But more importantly, that the differences between his various scores are very small. You can't really see all the numbers there, but the lowest scale score he gets for a subtest is two and the highest he gets is six, so only about a four-point variation. Potentially he could have gotten anywhere from a one to a 19. So there could be massive variation.

And the lack of variation is one reason that we can feel pretty confident that there is not brain damage, because brain damage tends to [235] affect certain areas but not others. And the fact that the scales are fairly even also suggest it's a valid administration. People who are faking get very erratic patterns because they don't know how many answers to answer correct and how many

answers to answer incorrectly in order to try to get the score that they want to get. So they get very odd graphs that are pockmarked with hills and valleys rather than fairly flat lines across.

Q Now, Doctor, this is the results. Do you have any chart to help us see what you're saying, saying better than that? I'm not sure exactly which – is it possible for somebody to fake these things?

A Well, the easiest way to malinger an IQ test is just to say yes to the first one or two questions and say nothing afterwards, because if you did that to everything you would get ones across the board, the lowest scores. Of course, if you are doing that, it's going to become pretty obvious because nobody gets ones across the board except people who are so obviously severely or profoundly retarded that you didn't need to give the test in the first place. These are people that are easily picked out. So that's not much of a problem. You [236] don't have to worry about those folks.

It would be pretty hard to malinger and get a pattern like this. You'd have to have extraordinary knowledge of the test, have decided in advance which questions you're going to get, do the equivalent of card counting in your head, keep track of how many questions you've said right or wrong.

The other thing is you don't just look at the IQ score out of context of the person's history. You have to look, for example, at their school records and their academic achievement. If I saw a 59 IQ, and the person had been a member of the National Honor Society, and I just looked at a wonderful letter that he had written the day before to

the Virginian Pilot ed page, then I would probably think that somebody was trying to hornswoggle me. So you do have to look at it in the context with other information to make sense of it.

Q In connection with that, do you have to look at anything other than just these test scores to make a determination of mental retardation?

A Yes. Mental retardation is about two things. Number one, it's about an IQ of around [237] 70 or below, and there are some space there, 70 or plus or minus five points is the official criteria. As high as 75, you can be considered mentally retarded. As low as 65, 66, you can be considered not mentally retarded.

Secondly, adaptive behavior. Being mentally retarded isn't just a low score on this test. It's about lacking certain abilities to function independently compared to what you'd expect for other persons your age. That's a really important criteria. Because there are some people who can score really well or really poorly on this test but who either do or don't function well in society. So you have to go out and find out by talking with family members and school records and employment records, if they have any, about how they function in the world at large. You need the two of them together to be able to say someone is mentally retarded.

Q So did you follow through on that, on his adaptability?

A Yes.

Q Did you find anything in the information that you obtained that would lead you to believe that he was

faking or attempting to mislead [238] you in this evaluation?

A Nothing. His academic records are crystal clear that he has been an academic failure since the very beginning. He has had some very minimal behavior problems in school, but what's more striking is his poor grades, the number of times he has failed tests and classes, the number of times he has had to be put in remedial courses, the lack of success in pretty much every domain of his life. I also spoke with his parents, with his mother and his father, who described a number of deficits compared to what you'd expect an 18-year-old to be able to do on his own. Eighteen being the age he was at the time of this offense.

Q Could you just accept his word for it?

A No, absolutely not, for two reasons: Number one, he could be lying in both directions. And that is that he could be exaggerating what he can do. It's just like people who are illiterate often say, oh, yeah, I can read that, but they really can't because it's embarrassing to say otherwise. Or he could be lying the other way around, saying, hey, I can't do things.

[239] For the most part, folks who are mentally limited overestimate what they can do. When you ask folks around them, they'll tell you they can't. So they'll say, oh, yeah, I can cook, but then when you start asking their family members, they say, I can cook a Pop Tart in a toaster oven, I can boil a frankfurter, I can cook a microwave TV dinner.

So the other reason for getting someone else's word besides what somebody who might be mentally retarded or a criminal defendant tells you is they may not have an accurate perception of their behavior. And that's true with all forms of mental illness, that part of it usually is lacking some degree of insight. You have to ask some other folks to see what other people say.

Q To give the jury some means of comparison, could you tell us what the scales of an IQ test would be for an average person. Not the average hundred, but what's an average, to get to an average intelligence on the IQ score, what do you have to do?

A Sure. You have to be between around 80 to 120. Anything in that range is considered within the range of average. In the 80s [240] is considered low average, but it's still close enough to average. In the 110 to 120 range, it's considered above average, but you're not up to the point where somebody is starting to be considered really a superstar, or, for that matter, academically gifted.

So the difference between his IQ score and the beginning of average is around 21 points. Could he have scored a little higher? Probably. When I saw him, he was mildly depressed. So the chances are he could have scored two or three points higher if he had been in slightly better condition. But there's nothing to suggest that he was so impaired that he could have scored, say, 21 points higher to get into the 80-point range. That would just be an astounding difference.

Q Can you tell us, give the jury some idea of how his mental retardation affects Daryl?

A Well, the stereotype of folks who are mentally retarded isn't necessarily what happens. Folks tend to think that someone who is mentally retarded is automatically illiterate, not able to use imagination, can't do anything on their own, drools with their mouth open, has a thick head, [241] abnormal speech, and that's not true at all. There are many mildly mentally retarded folks who are able to live reasonable lives with some assistance.

As a general rule, folks – and this is true for Daryl specific – folks who are mentally retarded have a couple of problems. Number one is their social confidence is pretty limited. That is, they are just not good in social relations. They often end up either bunching up with kids who are a lot younger than them, because that's where they are emotionally, or they end up affiliating with people who are a lot older than them and they are going along with the crowd. This is a common problem that folks with limited intellect are more likely to be pulled along with the crowd, in part because they want to fit in and in part because their own ability to apply social reasoning and make more independent decisions is impaired.

Number two: Folks with mental retardation are just slow learners. And I'm sure you've heard this expression, oh, he's a slow learner. That means a lot of different things. It means that it is harder for them to succeed in school and they are quicker to get frustrated. It means it's harder for them to do just about anything [242] in life, whether it's to get a job or work out a relationship, benefit from the feedback of the supervisor or the teacher, and they just don't get as far.

The other way in which mental retardation tends to affect functioning overall is that their abilities and their goals are usually equally circumscribed. It's a fancy way of saying that you can't really shoot for the moon if there's no chance of building a rocket.

Q Doctor, do you happen to do any disabilities?

A I do.

Q All right. I mean, evaluations for Social Security Administration.

A Right.

Q All right. Would Daryl qualify for that if he was out of prison?

A Oh, abundantly, because he's got both very limited IQ and the school records that really back it up.

Q Now, Doctor, as a psychologist, can you predict whether somebody is going to be a danger in the future?

A Predict a specific incident, no. [243] Assess general risk factors, yes.

Q Did you do that in this particular case?

A Yes.

Q And what did you base your assessment on?

A All of the data in front of me as well as the knowledge of the research on future dangerousness, which has identified the issues that are related to risk, not guesswork.

Q And did you review any records from prisons?

A Yes.

Q What did you review?

A I was able to review records from the Department of Corrections, where he's currently housed, as well as I was able to get some information from deputies about his functioning at the last jail that he was at for 17 months, I think, before he was sent to prison.

Q All right. Doctor, and you say you can't predict, right?

A You can't predict a specific event but you can talk about as to whether someone is at higher or lower risk in a specific environment. [244] Environment makes a big difference.

Q In Daryl's case, could you predict whether he would be a danger of future violence in society if he was out?

A If he was out, yes. We have statistical models, actuarial tables that can tell you the likelihood that he would be rearrested for a violent offense. Just as when you call your insurance agent and say, hey, I'm a Caucasian male, married with two kids, I don't smoke, my age is thus and thus, what is my life expectancy, and how much is my insurance premium, we can do the same sorts of things for folks who are released to the community, look at a set of characteristics, look it up in a table and tell you that people with similar characteristics, what proportion of them were rearrested for a violent offense, ten percent, 50 percent, 90 percent.

If we are talking about Daryl Atkins re-released to the community, I'd actually be able to tell you a number,

tell you the base rate for that number and the statistical likelihood that it was right or wrong.

Q If he's in prison serving life without possibility of parole, what would your [245] opinion be about his future dangerousness in that situation?

A Overwhelmingly, that there is no significant issue.

Corrections does a marvelous job of containing violence. We have almost 30,000 inmates in the Virginia Department of Corrections and an exceedingly low rate of violence and murder compared to what you'd expect when we look at comparing what happens in prisons to what happens in Virginia society at large. And that's amazing when you consider the fact that we're concentrating 30,000 of our worst citizens in those facilities.

Prison is a highly effective environment for controlling violence for several reasons. Number one, the biggest issue behind violence is very well controlled by comparison to the community, and that is alcohol and drug access. Are there alcohol and drugs in prison? Sure. There's a black market for some of those. But the incidence rate is a lot less than being able to run out down the corner and locate marijuana, alcohol, crack cocaine, heroin, take your pick, very easily. And when you have folks that are sober, you greatly reduced the likelihood of impulsive violence, which [246] is what most acts of violence are.

Number two is there is security all the time. Folks are locked down, their movements are tracked, their rooms get searched. They are separated from potential enemies.

If their behavior is a problem, they get segregated, such as the normal things that happen in jails and prisons greatly reduce the likelihood of someone doing violence to another person. We certainly have it, but we actually have real data, and I have some of it that I can tell you about, about the real base rate of murders and violent incidents in Virginia prisons.

Q Do you have a chart on that?

A Yes, I do.

Q Show that to the jury.

A This is Defense Exhibit 10. I apologize, this one is a little smaller. It's actually – wasn't intended to be used in this large setting, it's used for one of the trainings that I to on violence risk assessment.

The Bureau of Justice Statistics as a Federal arm of the government that collects the officialdata from jails, State prisons and Federal prisons throughout the country, and then publishes [247] them in a compendium every year. They don't always ask the same questions every single year. They may sample different pieces of information in different years. So one of the problems in looking at it is trying to figure out what they were assessing in a given year and what your question is.

The last time that they reported two consecutive years in a row for suicide, executions, murders and assaults or injuries was 1992, 1993. They haven't done anything else where they have had two or more years with the same questions.

The reason that I look at two or more years is – again, you're back to the issue of how do you know that one

year isn't a fluke. If you get one year with no murders, does that indicate the real base rate? If you get one year with three murders, does that indicate the real frequency that this occurs? So you want to kind of look at averages.

In 1992, Virginia's official lumbers were 54 deaths in prison. In 1993, they didn't report a total, although you can infer, if you really wanted to, from other sources as I have, and it's slightly more than 54. The number is [248] probably going up because of AIDS and also now hepatitis C. But, again, that's not related here.

At that time, when this was prepared we had 20,000 inmates in Virginia prisons. Now we have close to 30,000 because of changes in the sentencing guidelines. So the base rate per 100,000 people in the prisons is around 7.5 per 100,000. That is the murder rate, 7.5 per 100,000 prison residents you would expect to be murdered. The national incidents for homicides was 9.4 per 100,000. So in terms of the actual rate of murder, the rate of murder in a Virginia prison is lower than the rate of murder in society at large.

That's good news. That means prison is doing what it's supposed to do, taking the folks who are most violent and aggressive in society, keeping them appropriately constrained from hurting each other in the most severe ways.

When we look at aggravated assaults, that is, assaults where somebody got injured in a significant way, the base rate there is higher than society at large but not as high as you think. For a prison you come out with 750 per

100.000, and the base rate for aggravated assaults nationwide was 440 per 100,000, so a little less [249] than twice as high as society at large.

Again, I would argue that dangerousness is a really well-controlled issue in prison if it's barely one-and-a-half times the base rate in society, and we're clustering the worst people together. Sometimes folks say, well, there's all the unreported assaults with injuries. Well, that's true for the prisons, but that's also true for society at large. There's no way for us to reasonably estimate how that affects those numbers.

So overall, my message is with the rare exception of the inmate who has been chronically aggressive, documented to be chronically aggressive in jail or prison or other types of secure environments, the vast majority of inmates represent a very low risk of ever doing something that is seriously violent again in the future.

Q In your review of his prison records, did you find anything that indicated that he was chronically violent in the prison system?

A He was actually granted the opportunity in the jail to work in the kitchen staff, which means that they trusted him to handle utensils, knives, forks, things like that. The only trouble that I'm aware of that he has been in is one [250] time on death row he refused to take a urine screen test, and his report to me was that he was just tired of taking them. He said, "It's obvious I can't get anything, what's the point." That was his perspective. But he did comply with the others. I don't consider that a violent offense.

Q Doctor Nelson, is age a risk in concurring – recurring violence or dangerousness?

A Absolutely. If alcohol and drug abuse is the most common link for homicide, age is really the next strongest issue when you look particularly at homicide. Well, that's true for certain other types of nonviolent crimes, but when. it comes to murder, age is the primary issue. As you get older, the rates of murder go down dramatically.

Q Do you have anything to help us with that?

A I do. Again, Defense Exhibit Number 9. Psychologists are social scientists. We don't just render an opinion because it meets the way we feel about an issue or how we believe something is personally. You have to look at the data. You can't know what's normal and abnormal without looking at the real data on what happens or

* * *

[254] malingering or trying to influence you in making the decisions – the representations that you made to the Court today?

A Not in the slightest. In fact, his academic grades, the data that we have on whether he failed or passed literacy tests, the data that we have on the grades that he failed, his achievement test scores are all consistent with somebody who has just not been very bright from the very beginning, period.

Q People with Daryl Atkins' IQ, are they leaders or followers?

A As a rule, they are more likely to be followers. You're more likely to see these folks in offenses that

involve groups of people and going along with the crowd.

Q Did you find anything in any of the background material or interviews with his family that indicated that he was a leader?

A No.

MR. SAUNDERS: Thank you, Doctor Nelson.

THE COURT: At this juncture, before cross-examination, the Court is going to take a brief recess, allow the jurors to stretch, the

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[257] (The jury returned to the Courtroom and resumed their seats in the jury box.)

THE COURT: There are 14 members of the jury in the box. Do you waive the poll?

MR. ROGERS: So waive, your Honor.

MS. ADDISON: Yes, sir.

THE COURT: All right. You may cross your witness.

MR. HAHN: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. HAHN:

Q Doctor "Samenow," when you're appointed by a court – excuse me, Doctor Evans, when you're appointed –

THE COURT: Doctor Nelson.

BY MR. HAHN:

Q Doctor Nelson, excuse me, when you're appointed by a Court to evaluate a Defendant there are three statutory inquiries, is that correct?

A When appointed under the motion for the Defense, there are three things that I need [258] to respond to in the report. That's correct.

Q And the second statutory inquiry is whether the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law were significantly impaired at the time of the offense, is that correct?

A Correct.

Q The short answer in a nutshell to that statutory inquiry in this case is no, is that correct?

A That's the short answer, yes.

Q You have no evidence that Daryl Atkins was unable to appreciate the criminality of his conduct, to conform his conduct to comply with the law at the time he murdered Eric Nesbitt?

A His capacity is impaired but not destroyed.

Q Okay. You don't contend that alcohol and drugs would have destroyed his ability to know the difference between right and wrong?

A Not at all, no.

Q He understood it was wrong when he shot Eric Nesbitt eight times?

A Yes.

[259] Q He understood that he was committing murder?

A Yes.

Q The first statutory inquiry is whether the Defendant acted under extreme mental or emotional disturbance at the time of the offense, is that correct?

A Yes.

Q And you've testified you observed no severe neurological defects that would have affected his mental state?

A That's correct.

Q His ideas were rational in his conversations with you, and no sign of delusion or thought disorders?

A At the time of the offense, correct.

Q And when you spoke with him he exhibited emotions appropriate to the time and place?

A Yes.

Q Did he ever cry?

A No.

Q In fact, you found that Daryl Atkins exhibited a total lack of remorse by being [260] indifferent to or rationalizing having hurt, mistreated or stolen from another one?

A I don't believe that I find that at all anywhere in the report.

Q Did you find a lack of remorse?

A I found a lack of remorse for many things. As with many criminal defendants, he had explanations or excuses or blamed other people for things.

Q You graduated from the University of North Carolina in Chapel Hill in 1991?

A Correct.

Q And you have published some books, have you not?

A No, I don't publish books.

Q Did you publish the Virginia Jail and Mental Health Services Directory?

A Yes, I did. I was an editor of it, not a publisher.

Q And what type of book is that?

A That is exactly what it says, as I described. It was an appointment from the Department of Mental Health for me to conduct a survey of all jails in Virginia and develop a catalog of the mental health services that were [261] provided to inmates.

Q Have you ever testified or qualified as an expert witness outside of Virginia?

A I'm sorry, outside of Virginia?

Q Outside of Virginia.

A In Federal Courts, but not in courts in other states. I only practice in Virginia.

Q You reviewed the records of the Defendant in the City of Hampton Schools, is that correct?

A Yes, I did.

Q And you are familiar with the term special education, as that is used as a term of art in the education system, are you not?

A It's used as a general term. There are actually more specific terms within the education system.

Q Okay. Well, there are statutory requirements for people who are to be placed in, quote, special education, is that fair?

A I – you're asking about something that is beyond me. There is specific language. I don't know whether it refers to as special education. But there are specific programs that are [262] titled to be special services that folks have to meet criteria to be in, yes.

Q Okay. And when the schools find those type of people, they have to develop what's called an Individual Education Program, or an IEP?

MR. SAUNDERS: Your Honor, I think he has already said this is outside his field of expertise. I'm not sure where this is going, but it doesn't appear to be in his field of expertise.

THE COURT: I'll permit the question. If he can answer it, he can; if not, he can't.

THE WITNESS: I'm sorry. Can you restate the question? I lost it in the discussion.

BY MR. HAHN:

Q Sure. People who have educational handicaps in schools are required by law to receive, quote, a certain special education?

A Correct. If they are tested and below and fall at or below a certain standard then they have to have an Individualized Education Plan, an IEP.

Q Okay. And that's for – do you know how an IEP is formed?

A How the IEP treatment team is [263] formed?

Q Right.

A Yes.

Q Who would it consist of?

A Again, there's a statute that says exactly who has to sit on it, but, in essence, it's members of the school. It involves consultation with the school psychologist, usually a guidance counselor is present, and they have to come up with an actual plan.

Q Okay. To address the deficiency of the student?

A Correct.

Q Okay. Did you find that Daryl Atkins ever had an IEP while he was in the Hampton School System?

A No, he did not have an IEP specifically.

Q Was he referred to a screening committee for the possibility of the development of an IEP?

A Yes, he was, on March 25th, 1991, I believe.

Q And they declined to refer him for a full evaluation, is that correct?

[264] A That's correct. They chose a different set of services for him instead.

Q Okay. In response to statutory inquiry as to whether the Defendant acted under extreme mental or emotional disturbance at the time of the offense, your report was that it is the opinion of the undersigned that Daryl Atkins was voluntarily intoxicated on substances at the time of the offense, correct?

A Yes.

Q Do you personally know the degree of intoxication that Daryl Atkins was under at the time of Eric Nesbitt's murder?

A I don't have any urinalysis or blood data, no.

Q What is your opinion based on?

A His report that he was voluntarily intoxicated, corroboration from the Co-Defendant, his statement that they had been using substances.

Q Again, in – as I did before, the short answer to that statutory question, whether the Defendant acted under extreme mental or emotional disturbance at the time of the offense is no?

A Correct.

Q Now, the final statutory inquiry [265] which you are directed to address is whether there are any other factors in mitigation relating to the history or character of

the Defendant, of the Defendant's mental condition at the time of the offense, is that correct?

A Yes.

Q And in response to that statutory inquiry, you opine, in the opinion of the undersigned, the Defendant met the criteria of the diagnosis of mild mental retardation?

A Yes.

Q And that's based upon the IQ test that you told us about that you gave to him?

A Correct.

Q In your review of the Hampton City School records, did you find anyone that ever indicated that Daryl Atkins was mildly mentally retarded?

A There was no one who had ever given him an IQ test in the course of his time there.

Q Well. Thank you for that answer, but it doesn't answer my question. In your review of the Hampton records, did you find anyone in the school system or any record that indicated that [266] Daryl Atkins was mildly mentally retarded?

A Well, the only people who are qualified to diagnose mental retardation are folks who are licensed by the Board of Psychology or the Board of Medicine to do so. He was never evaluated. None of his teachers expressed such an opinion, if that's the question.

Q How about did you see anything from the school psychiatrist with a concern about that?

A I didn't see anything that he was evaluated by the school psychiatrist.

Q Psychologist. Excuse me.

A I didn't see anything that he was evaluated by a school psychologist.

Q Did you see anything that he was ever referred to the school psychologist?

A He was referred for an IEP evaluation.

Q All right. And they declined to put him in special education?

A They declined to follow up with the referral and chose an alternative disposition of a different level of services. They chose instead to put him in the lowest level of classes possible, [267] short of putting him in special education, and to give him an opportunity to go to an alternative school with a smaller class size, but he'd have more intense supervision.

Q And what grade did Daryl Atkins receive in English once he went into that class?

A Well, the year that he's in Beach Side, which is his 12th grade, his grades jump up to C's and D's. He's got one A during that year.

Q And that one A was in senior English in that special school?

A I think that was the case. I didn't list the specific class in my summary notes, yes.

Q Did you find in your evaluation and investigation any evidence of severe sexual or physical abuse or chronic neglect of Daryl Atkins as he was growing up?

A None whatsoever. Very clearly stressors in the home related to the divorce and his mom's remarriage to somebody who apparently had an alcohol problem. But this was not the case of an individual who came from a home with chronic abuse or neglect.

Q Would you agree with this

* * *

[269] the rate of recurrence in the prison system is so low.

Q Well, on your testimony direct, if I understood correctly, you said you can predict better if he returns to the community than if he's in the prison system, is that correct?

A Absolutely correct.

Q What would his risk be if he's returned to the community?

A I didn't run the actuarial numbers. It wasn't relevant to someone who is going for life without parole. It would be pretty high. He has a lot of risk factors in the community at large.

Q And what are those risk factors?

A Well, it depends on which scale you wanted to use. He's got age, if he was returned to the community at this time. He's got the fact that he comes from a family where he didn't live with both parents to age 16. He's got the fact that he has prior offenses. He's got the fact that

he has substance abuse problems and was using substance abuse at the time of the offenses. Those are all examples of risk factors that go into predicting things in the community.

[270] Q If I understood you correctly, you said that the age risk factor drops off after 40 and that coincides with the hormonal changes in the male?

A Yes.

Q You testified on direct as to the statistics regarding murder, and I assume those were FBI statistics, is that correct?

A Those are the data that are reported by State jails and prisons as well as Federal prisons back to the national organization for collecting it, as I explained, the Bureau of Justice Statistics.

Q And they represent nationwide statistics?

A They have nationwide as well as in this case the breakdown by state.

Q Do you know how many murders were committed in York County in 1992-1993?

A I'm sure we could look it up, but I don't have a clue how many.

Q So if I'm correct, Daryl Atkins, if he were returned to the community, would be a risk because of his age and because of his substance abuse?

[271] A Those would be the two largest risk factors for him, yes.

Q And because of his prior history of violence?

A Exactly.

Q Would you agree with this statement: This prior – past behavior remains the strongest predictor of future behavior?

A In the community, absolutely; not for predicting behavior within the prison environment.

Q Would you agree that Daryl Atkins meets the criteria for having antisocial personality disorder?

A He marginally meets the criteria. There is probably some room to argue about whether he has some of the things you have to have before age 12 or 15, because he doesn't have some of the early conduct disorder. There is probably some argument to be made that most of his problematic behavior is substance-abuse related. But overall, yes, I would say he's just like the vast majority of criminals, he has an antisocial personality disorder.

Q Okay. I want to make sure I

* * *

[290] occasion?

A They do.

MR. HAHN: I have no further questions.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. SAUNDERS:

Q Doctor Nelson – excuse me, I forgot one thing – the Commonwealth asked you about his school records.

A Yes, sir.

Q Asked you about certain schools, is that correct?

A Correct.

Q Did you chart Eric's grades throughout his – Daryl's grades throughout his school?

A Yes, sir, I did.

Q Do you have that chart with you?

A Yes, I do.

Q Could you tell us what exhibit that is?

A There's actually two exhibits on [291] this because it overflowed one. The first is Exhibit Number 8, Defense Exhibit 8.

Q All right. Doctor, could you go over that chart for the jury?

A Sure. Except for a little bit of time when he was in the Newport News School System, he was in Hampton pretty much straight through. So something that's rather unusual in these sorts of cases, they actually have the academic records. The other reason we have them is he's young. Most school systems destroy almost everything except a transcript after they turn around 25, about seven years after graduation. This is very hard with older defendants to do this.

Starting with first grade, he gets all satisfactory grades.

In the second grade, he actually failed. And the comment from the teacher was work of grade too difficult. So they put him back through second grade a second time. He got all S's except for a problem with reading, where he had needs improvement, NI.

In third grade, he got three satisfactories, two B's and five C's.

In fourth grade, his grades began [292] to decline, three D's and four F's, and it says in his record, placed in fifth. That is, it wasn't that they thought he was appropriate for fifth, it was a social advancement to fifth grade.

In fifth grade, his grades aren't very good there either, two satisfactories, six D's, two F's.

In sixth, we don't have his records because he wasn't in the school system.

In seventh, that's when he was referred for the IEP, the special education testing but the committee decided no screening to be done.

In eighth grade, he got all F's. And one comment on the transcript that seemed especially to characterize what folks were saying was, quote, Daryl has not improved during the last semester and, therefore, is still not meeting the requirements for promotion.

There is another piece related to this, a special test in order to pass on that I'll mention in a moment.

In ninth grade, his GPA was a D-plus.

And the two times that he took tenth grade, it was D-minus, and then that's when he [293] stops.

This also has behavior records. There were no suspensions or expulsions. There is no indications of any chronic violent behavior. There is no indications of any substance abuse on school grounds. There is no indications of severe tardies. There are some times in tenth grade particularly when he's absent but there is no ongoing pattern from a young age. He just didn't do well.

The second piece of this, because this overflowed one chart –

Q Doctor, could you give us the exhibit number?

A Oh, I'm sorry, this is Exhibit Number 11 for the Defense.

Q And that's styled what, summary of Literacy Testing Program scores?

A Correct. The LTP. And if any of you have children, you know that they have to take this test in order to go to high school and, in fact, they are a requirement per Virginia law. And as cited on the bottom of Hampton City's own LTP test, quote, any eighth grade students in Hampton City Schools who have not passed all three tests by [294] the end of the eighth grade will not have attained the status of a ninth grader and, therefore, not be promoted to high school for the 1993-94 year.

That's what was written on his eighth grade test. They start giving this at a younger age, and the vast majority of folks, fortunately, do pass it earlier on.

As you can see, when he was given it in sixth grade, he failed all three subsections.

In seventh grade, he passed. To give you an idea, though, this is scored between 150 and 300 points – excuse me, between 100 and 300 points. You need to have 250 to pass. His score was 256. He passed by a very slim margin.

And then he was given just the writing test in eighth grade. He failed.

In ninth grade, he passed. His passing score was 257, again, just barely above that 250 mark.

And then he was given it the second time during tenth grade and passed math with a wholesome 251, made it by one point.

Q Doctor, in reviewing the Hampton school records, did you find any correspondence that indicated that they were going to give him special [295] training to help him pass these tests, do you recall?

A No, I did speak with the folks at Hampton Schools to interpret the transcript. But there's no actual written letters from them other than saying that, gee, we recognize somebody to refer to a special eligibility committee but we're going to redirect that at this time.

Q Now, Doctor, the Commonwealth asked you about any indications in the Hampton School records of Daryl's mental situation. Did you review any standardized tests he was given?

A Yes.

Q Specifically, did you review the differential aptitude test for the Career Center Interest Inventory, do you recall that?

A Well, I reviewed a lot of achievement tests. I don't remember that one specific test.

Q Did any of those indicate in their standardized test scores that he was performing at a normal level?

A No. Overwhelmingly, this fellow falls below the 20th percentile in almost everything he's tested with. As you'd expect on the academic [296] achievement test, they went down and down as he went into high school. Why? Because he was falling behind his grade level in terms of his ability to read, write and do math and, therefore, when asked to do that on those achievement tests, it looks like he gets progressively lower scores. That doesn't mean he gets dumber, that just means that his academic skills aren't keeping pace with everybody else.

Q Would that be an indication that the problem has been a long-term existing problem?

A The fact that it started back in elementary school is an indication. There are some people that hit their teenage years and just stop trying. But the fact that he's having problems with focusing, with attention, with getting good grades starting as early as first grade, and is consistent all the way through, is what suggests mental retardation as compared to somebody who is just a teenager who is rebelling against the system.

Q Doctor, you've been questioned substantially about antisocial personality disorder. And you gave answers. There is no question in your mind that Daryl

Atkins would be a high risk of more violent crime in the community?

* * *

[309] Q Would you be surprised at the superintendent's memo, dated December 18th, 1991, states what must be done for students who meet all requirements for promotion to the ninth grade except earning a literacy passport? They must be provided resources, they must be classified as an ungraded student, they must be placed and take courses but they cannot be held back?

A That wouldn't surprise me.

Q Do you know how many students across Virginia passed the math section of the Virginia Literacy Test Passport in years '91 and '92?

A I have no idea.

Q Would it surprise you that only 40 to 50 percent of the students in Virginia in grades six, seven and eight passed that test?

A It's a disappointing result. Yes, it would surprise me that only 40 percent passed.

Q Would you like to see verification of that out of the superintendent's manual?

A Is the Commonwealth prone to lying? I don't think I need to see verification, thank you.

Q It is a disappointing result?

* * *

———

[Admission Of Defense Exhibits 6-12]

[314] them.

THE WITNESS: I understand. I'll keep a short leash.

THE COURT: Okay.

MR. SAUNDERS: Your Honor, I would move that Defense Exhibits 6 through 12 be introduced at this time.

THE COURT: All right.

MR. HAHN: No objection.

THE COURT: All right. Mark those Exhibits 6 through 12, Defense Exhibits 6 through 12 as part of the record and part of the evidence in the case. So marked.

(Defendant's Exhibits Number 6 through 12 were received in evidence.)

THE COURT: Anything further?

MR. SAUNDERS: Defense would rest at this point in time.

THE COURT: The Defense rests. Does the Commonwealth have rebuttal?

MR. HAHN: Yes, your Honor. We would anticipate one witness.

THE COURT: All right. Proffer to

* * *

[318] Ask the jury to come back.

THE CLERK: Will the jury please return to the Courtroom. Will the jury please return to the Courtroom.

(The jury returned to the Courtroom and resumed their seats in the jury box.)

THE COURT: There are 14 members of the jury in the box. Waive poll?

MR. ROGERS: So waive, your Honor.

MS. ADDISON: Yes, sir.

THE COURT: All right. Thank you. Call the doctor back in, if you would, please.

THE CLERK: Doctor Samenow, please come into the Courtroom.

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF YORK

COMMONWEALTH OF VIRGINIA	:	CASE NO. 98-8229 (6)
VS	:	
DARYL RENARD ATKINS	:	

Stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and all other incidents during the hearing in the above-styled cause, held in the Circuit Court for the County of York, at Yorktown, Virginia, on August 18, 1999, before the Honorable Prentis Smiley, Jr., Judge of said Court.

DOCTOR STANTON E. SAMENOW,

called as a witness in rebuttal by the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * *

[326] cross.

THE COURT: All right. Any challenge to the qualifications?

MR. SAUNDERS: No, sir, it wouldn't do me any good.

THE COURT: All right. The Court will find – will grant the Commonwealth's motion to qualify Doctor Samenow as an expert in clinical psychology, with his direction toward the forensic area of psychology based on his experience and education in the field.

Ladies and gentlemen of the jury, that, again, means this witness can opine or give you his opinion in his field of expertise.

FURTHER DIRECT EXAMINATION

BY MR. HAHN:

Q Doctor Samenow, did you evaluate the Defendant in this case pursuant to a Court order?

A Yes, I did.

Q What was the purpose of that evaluation?

A Well, it was for the purposes of [327] sentencing, and it was really to look at several factors, whether the Defendant was under extreme mental or emotional duress at the time of the crime. In fact, I prefer to use the language as the statute has it, whether he acted under extreme mental or emotional disturbance at the time of the offense, and whether he had the capacity to appreciate the criminality of his conduct, and also to look at whether there were other factors in mitigation with respect to the history of the Defendant or his character.

Q Did you interview the Defendant with regard to this inquiry?

A Yes, I did.

Q How many times?

A On two occasions.

Q When was your first interview with him?

A It was July 23rd, 1999.

Q Were there any difficulties that you first encountered?

A Yes.

Q Tell us what they were.

A Well, I arrived at the facility where the Defendant was housed at 7:45 in the [328] morning. And the Defendant at first – well, I was told by one of the correctional officers that the Defendant refused to come out and talk. And I offered, I said, "Well, can I come down and talk to him," and that's through the door of his cell. And the correctional officer said I could. And I did. And I simply said to him, "Mr. Atkins," and he was in bed, although awake at the time, I said, "I am here to interview you." And I said, "This is at the request of the Commonwealth Attorney." I said, "Your attorney knows that I am going to do this." And I said, "I think that you should come out and talk to me." And I also said that, "My understanding is that you will help yourself, and your attorney will be able to present whatever he's going to present, but you need to come out and talk to me."

And I then went back to the room where I was going to interview him, which was on the unit, and he rather rapidly came out. And there were no further problems after that.

Q Did you ascertain that the Defendant understood the nature of the proceedings and what was going on?

A Yes.

[329] Q How did you do that?

A Well, at several points during the two interviews, I asked him very specific questions. I asked him, "Who is the Commonwealth Attorney or what is the Commonwealth Attorney?" And he said – and this was his word, "Prosecutor." I asked him when the hearing was to be, and he said, "On the 17th."

MR. SAUNDERS: Excuse me just a minute. I thought this was in rebuttal of Doctor Nelson's testimony. There has been no issue raised by Doctor Nelson's testimony as to competency. And this line right here doesn't seem to be in rebuttal of anything that Doctor Nelson said.

THE COURT: Mr. Hahn?

MR. HAHN: I was just laying a foundation that the Defendant understood what the doctor was doing there and interviewing him. If –

THE COURT: I don't believe there was any issue of competency raised by Doctor Nelson.

MR. HAHN: This doesn't go to the level of competency, it's just that he understood what this doctor was doing. And since there was no dispute about that from Defense, I'll proceed.

THE COURT: All right. Thank you.

[330] BY MR. HAHN:

Q In your interviews with the Defendant, did you ascertain any evidence suggestive of mental retardation?

A I found absolutely no evidence other than the IQ score that I knew of, because I reviewed a number of materials. No evidence did I find other than that indicating that the Defendant was in the least bit mentally retarded.

Q Do you have an expert opinion as to the Defendant's intellect?

A He is of average intelligence, at least.

Q Explain the basis of how you came to this conclusion.

A Largely through several indices. One is the vocabulary and syntax that he used in talking with me. And I have many examples.

Q Can you give the jury some examples of that?

A Yes. And I prefer to go to my notes directly.

When the Defendant was talking about how little he did in school, I asked him what his mother did about this. And his words were, "She [331] encouraged me."

When I was asking him about how it was in the situation in which he was incarcerated, he said he gets frustrated. And I said, "What's frustrating?" And he said, "Well, being in here." And I said, "Well, what do you mean?" And he said, "Well, that comes automatic."

When I asked him later in the interview, "Do you think that you're basically a good person," he said, "Half

and half." He said, "There's the half that doesn't want to get into trouble, all the positive stuff."

I asked him on the 23rd of July, "Who died last week?" He said, "Kennedy." I said, "How?" "His plane crashed." I said, "Well, did anyone else die?" And he said, "I think his wife and a friend." I asked him where the plane was flying to. He did not know the answer to that. I asked him the state in which that occurred. He couldn't remember. I asked him did he know where Mr. Kennedy was going to be buried. He said he didn't know.

I said, "Well, who was Mr. Kennedy's father?" And he said, "JFK." I said, "Who was that?" He said, "He was president." And I [332] said, "About when?" And he said, "1961."

Q Did you give him any type of test or use any type of test instruments?

A I did.

Q Would you tell the jury what you did regarding those?

A I gave him some items from the Wechsler, that's W-E-C-H-S-L-E-R, Memory Scale. In the very beginning I asked him his age, when he was born, I asked him who is the president of the United States. His response, Clinton. I said, "Who was president before him?" "Bush." I said, "Who is the governor of this state?" He said, "Gilmore."

I gave him numbers to remember in sequence, a series for him to recall them forward. In other words, if I said seven, six, two, four, he would repeat them after me. He got the items correct as far as you could go, which is eight digits in a row. On digits backwards, he did not do

as well. He got four correct. What this has to do with is the ability to concentrate and pay attention when he so chooses.

I gave him a task called associate learning, and what I did was to read him items that go together. Let me restate that. I administered [333] him pairs of words that are put together. For example, black cow. House ground. And some of these go together better than others. I'm not using the actual items from the test. And there were one, two, three, four, five, six, seven – there are ten of these pairs, and I read the whole list. And then I asked him to try to recall what went with each word. And you do this three times. Initially, he had only three correct. On the second administration he had all but one correct. And on the third administration he had all but one correct.

I administered a test called the Thematic Apperception Test. And essentially what that is is you hand the person a card. It's – it has a picture. It's a black and white picture. And you ask the person to tell a story. And I did this on five cards. These, by the way, do not have a right or wrong answer, but I administered them because I was interested in how he would deal with them. Would he make up a story, was there cause effect, what sort of vocabulary would he use, would he even follow the directions. He did follow the directions.

Just to give you just one example, but there are others, on card one, which shows a [334] desk, a boy seated, and there's a violin on the desk. He said, "It's a boy with a violin." And I said, "Tell me a story." He said, "He's going to be in the orchestra," that was his word, "in the orchestra when he grew up."

I said, "What's he going to do?" "He's going to play it." And I said, "Well, what is he thinking about?" "Well, it's like he's sad." I said, "Why?" "Maybe he didn't know how to play it." I said, "Well, what finally happens?" "I guess somebody teaches him."

Now, that story had a story. It was a story. There was cause effect. There was the word orchestra. And this man throughout the interview used very sophisticated words, words such as parable, which he used in a discussion I had with him.

I also gave him some items from the Wechsler Adult Intelligence Scale. Now, I did not give him entire subtests. He had had the entire test. Doctor Nelson administered it to him. My purpose in asking him selected items was to push him just a little bit to see whether, in fact, perhaps he knew more than he had indicated previously, when Doctor Nelson had administered the test.

[335] And I asked him – well, let me say what I found, because I'm really not supposed to use the exact items in case any of you do take the test at some time. The point is that the items that I asked him, on many of them he would give me a partial answer, and if I pushed him just a little more and said, "Well, could you explain it further," he would give me a more sophisticated answer, an answer that would be a two-point answer rather than a one-point answer. And that didn't happen on every item, but it did happen on six of them. And that's six out of – let's see how many I gave him, 12. So on about 50 percent of them he did give more sophisticated answers, including answers to two very difficult items.

With vocabulary words, I did the same thing. And in several instances, by no means all, he did give a fuller response indicating that he had a better understanding of the word than he had indicated with Doctor Nelson.

I also asked him some other questions such as, "How many pennies are there in a dollar," to which he said, "One hundred." I asked him, "How many nickels are in a dollar?" He said, "Twenty." "How many dimes are in a dollar?" He [336] said, "Ten."

So the point that I'm making is that the vocabulary, not simply the test, but the spoken vocabulary, he used the term correctly with me while talking, deja vu, being a psychic. He told me, "I can do math." These are his words, quote, "I can do math, subtraction, Algebra, Geometry, fractions, decimals, reciprocal fractions. Money, I can count good, add good, but I failed math. I ain't do nothing."

"Science, I can do a little chemistry. I used to know the elements, pi, P-I, is 3.15. I watch Jeopardy and Wheel of Fortune shows. I can solve the puzzles before anyone else can."

Q Doctor Samenow, did you review Daryl Atkins' school records, the same records that Doctor Nelson reviewed?

A I did.

Q What is your opinion regarding his academic performance, or lack thereof?

A His academic performance was by and large terrible. Translated into more exact terms, D's, and F's, largely. There were times when he had A's and B's. There

weren't many. But his school records are punctuated with statements by [337] teachers about his lack of motivation, his lack of concentration, a statement that he could do better, a discussion of – or a citation of poor study habits.

He passed the Literacy Passport Tests, not by a lot, but he did pass them, which are necessary to be in the ninth grade and be eligible for a high school diploma. And I cannot recall seeing in one place a statement by a teacher that he was unable to do the work or that they suspected that there was an intellectual deficiency.

It was constantly problem with authority. Tardiness. Loitering. Disciplinary problems. Problems that had to deal with attitude. And in some cases, as I say, not in many, well, there was a notation about improvement in three subjects, basic subjects. I think it was writing, science, and there was one other. So this is a person who chose to pay attention sometimes, not to pay attention others, and did poorly because he did not want to do what he was required to do.

Q Doctor Samenow, let's get to the statutory inquiries that you're required to take a look at and give your expert opinion on, the first being whether the Defendant acted under extreme [338] mental or emotional distress at the time of this offense. Do you have an opinion regarding that issue?

A I do.

Q Would you tell the jury what that is?

A He did not act under extreme emotional or mental distress at the time of the offense.

Q How did you come to that opinion?

A Well, Mr. Hahn, I couldn't find anything. I mean, the man was intoxicated, and by that, as he explained it to me, early on that date, I believe the date was August the 16th of 1996, he and his Co-Defendant were drinking. They drank beer. I think he told me that they had some gin as well. They smoked some marijuana. This was not an unusual thing, he told me. I mean, he used marijuana. He drank alcohol. He had done it on other days, but he was intoxicated. But that voluntary intoxication did not impair him so that he could not plan, deliberate, or act in a planful manner.

Q Was the capacity of the Defendant to appreciate the criminality of his conduct or to [339] conform his conduct to the requirements of the law significantly impaired at the time of the offense, in your professional opinion?

A No.

Q Tell us why.

A Well, the crime itself required planning and forethought and deliberation at virtually every stage.

Q Now, the third inquiry is whether there are other factors in mitigation relating to the history or character of the Defendant or the Defendant's mental condition at the time of the offense. And you are aware that the Defense has offered into evidence the opinion of Doctor Nelson that the Defendant is mildly mentally retarded. Do you share that opinion?

A No, I sharply disagree with it.

Q When is mental retardation usually diagnosed, Doctor? Are you aware of that?

A My understanding is that it usually appears when the person is a child, certainly before the age of 18, and is usually noted somewhere by somebody in the schools, if not within the family.

Q Are you familiar with this small [340] book I'm holding, DSM-Four?

A I am. I have a large version with me.

Q Would you turn to – well, my page number would differ from yours. Turn to the section on mental retardation.

A I have it.

Q What is that chapter – what is the title of the chapter dealing with mental retardation?

A The overall chapter title is Disorders Usually First Diagnosed in Infancy, Childhood or Adolescence.

Q Are there two criteria – do you agree with Doctor Nelson? He said there are basically two criteria in mental retardation, significant subaverage intellectual functioning and impairment in adaptive functioning basically meeting the effectiveness of standards expected for his age by his culture group.

A Those are the two criteria, yes.

Q Can you tell us whether you believe there is any impairment in his adaptive function or whether he meets the standards expected for his age by his culture group?

[341] A Well, Mr. Atkins never lived independently. In other words, he was not a self-supporting member of society. However, he told me he was able to wash his

clothes, wash and dry his clothes, he used his parents' washing machine and dryer. He told me – when I asked him if he was able to cook, he gave me his recipe for cooking chicken.

This Defendant, Mr. Hahn, as I understand it, lived a life in which he didn't work, and I don't mean just didn't hold a job, that he didn't do, but then again there are a lot of 18-year-olds who maybe haven't worked because they've been in school. But he didn't work in school either.

So the point is he chose a certain – to live a certain way of life, and there was no lack of ability to adapt and to take care of basic needs, certainly.

Q Have you given any thought to the Defendant's future dangerousness?

A Yes.

Q What would you think, in your opinion, is the best predictor of future behavior?

A Past behavior.

[342] Q Does the fact that Daryl Atkins' prior crimes involve confrontation of victims, is that significant in any manner in assessing risk of future dangerousness?

A Yes, I think it is.

Q Would you tell the jury why you feel that way?

A Well, put another way, if a person has a pattern of violent behavior, that is not a definitive predictor, I mean, there is no definite predictor, but it is about the best that we have in terms of risk factors. So violent confrontation

with other people, with or without a firearm, of course, particularly with a firearm, certainly is a negative harbinger for the future. It is a significant risk factor for their violent behavior.

Q Do you believe that Daryl Atkins is diagnosable as having antisocial personality disorder?

A I do.

Q Why is that?

A Well, there are a number of criteria listed in the book that you just referred to, the Diagnostic and Statistical Manual, Fourth Edition, and he meets most of those criteria.

[343] Q Are there seven criteria?

A I believe so.

Q Okay. Would you just quickly go through and tell us how many you think he meets?

A Bear with me while I find the right page so I can refer to these.

Do you want me, Mr. Hahn, to go down the list, or how do you want me to do this?

Q If you would just read the seven – how many do you have of the seven items does he have to meet the antisocial personality behavior, or disorder?

A Well, it says here there is – that diagnostic criteria there is a pervasive pattern of disregard for in violation of the rights of others occurring since age 15, as indicated by three or more of the following, and then there are seven criteria listed.

Q All right. So he has to meet seven – three of the seven?

A Three of the seven. And then there are three categories thereafter.

Q All right. How many of those seven items do you think Daryl Atkins meets?

A Seven.

[344] Q What significance is that regarding risk factor of future dangerousness?

A Well, among the criteria for antisocial personality are reckless disregard for safety of self or others and lack of remorse, as well as irritability and aggressiveness. Now, this Defendant has shown all of these.

And so, again, if you are looking at the character of a person, the personality of an individual, that person's mental makeup, again, the past is the best indicator we have in terms of risk for the future.

Q Did he ever exhibit any remorse for what he did, to you?

A Not to me. In fact, he said he was angry at having to be in prison.

Q What's the implications in that statement for his future dangerousness?

A I think, Mr. Hahn, that really what it says – may say a lot more, but I think it simply says that he's thinking about himself and what he's going through. I can't read his mind. I don't know if he's giving any thought to the victim and the victim's family. He did say to me, in

answer to a question that I asked, that he knew that [345] the victim had a family and that the family was hurt. But his anger is at the circumstances in which he finds himself. And that was his emphasis.

MR. HAHN: I have no further questions.

THE COURT: All right. I'm going to recess for the evening.

Doctor Samenow, you may stand down. I'm going to recess until tomorrow.

THE WITNESS: Thank you, your Honor.

THE COURT: Be ready to proceed with your cross-examination in the morning, okay?

MR. SAUNDERS: Yes, sir.

THE COURT: Ladies and gentlemen of the jury, during this evening recess, again, I caution and admonish you not to engage in any discussion or engage in any conversation with any party, any of the witnesses or the attorneys or any of the spectators.

You are not to go to the scene nor undertake any independent investigation.

No one should approach you to discuss the matter, and you should not remain within the hearing of anyone who is discussing this case.

* * *

VIRGINIA: IN THE JUVENILE & DOMESTIC RELATIONS DISTRICT COURT FIFTH DISTRICT CITY OF SUFFOLK

In the Matter of)
) ORDER
DARYL RENARD ADKINS [sic]) J-10475-01/02
a child 13 years of age

This matter came on to be heard on the attached petition(s) on this date, at which hearing said child was present in Court in the company of his father and was represented at all times by Wayne Sprinkle, Esquire, his counsel. And it appearing that said child is present in Court by reason of being subject to the Juvenile and Domestic Relations Court Law, it is adjudged that he is subject to said law. He being a delinquent child in that he is found guilty of break and enter, in violation of Section 18.2-91; petit larceny, in violation of Section 18.2-96; all of the 1950 Code of Virginia, as amended.

Accordingly, it is hereby ordered that the Fifth District Court Service Unit shall, pursuant to the provisions of Sections 16.1-273 and 16.1-274 of the Code of Virginia, make an investigation and file a written report thereon which shall include the physical, mental and social conditions and personality of said Daryl Renard Adkins [sic].

And this case is continued to the 3rd day of December, 1991 at 9:00A.M. for consideration of said report and disposition of the case(s).

Entered this 22ND day of OCTOBER, 1991.

/s/ R. D. Hunter, JUDGE
R. D. HUNTER, III

ADJUDICATORY ORDER

J012744

ATKINS, DARYL
11-6-95

03-00 ROBBERY on Juvenile
9-8-95 18.2-58 Reduced to Grand Larceny 18.2-95

KLENE, DET/HPD

9-11-95

EIGHTH JUDICIAL DISTRICT, CITY OF HAMPTON
JUVENILE & DOMESTIC RELATIONS DISTRICT COURT
30 KING'S WAY
HAMPTON, VA 23669

I, THE UNDERSIGNED CLERK OR DEPUTY CLERK OF THE ABOVE-NAMED COURT, AUTHENTICATE PURSUANT TO VA. CODE § 8.01-391(C) ON THIS DATE THAT THE DOCUMENT TO WHICH THIS AUTHENTICATION IS AFFIXED IS A TRUE COPY OF A RECORD IN THE ABOVE-NAMED COURT MADE IN THE PERFORMANCE OF MY OFFICIAL DUTIES.

1-16-98 /s/ Betty Gatiwood
DATE [ ] CLERK [X] DEPUTY CLERK

/s/ Joe Stellute
Attorney A/[R]/W

OFFICE CONTACTS AND COURT PROCEEDINGS

DARYL ATKINS IP ELVIRA BULLOCK IP

9-11-95 def present w/mother and father def to remain in Secure Detention parents to employ counsel continue to 9-15-95 to check atty. LRL/PAK

9-12-95 Per Cf. Joe Stellute, retain Def atty request Detention hearing 9-15-95 pak

9-15-95 def present w/mother, father and atty Stellute def to remain in secure Detention. Ct will authorize Electronic Monitoring 10-17-95 trial date LRL/pak

10-17-95 def present w/parents and atty Stellute, CA motion to reduce charge to Grand Larceny. No objection motion granted. def offers plea of guilty. Waiver & stipulation of evidence. Ct accepts plea. Ct finds def guilty Disposition 12-08-95 LRL/pak

12-8-95 P.O. request cont to 1-12-96 pak

1-12-96 Def. present with both parents and atty. Stellute. Court does sentence defendant to 120 days in jail (may be served on the weekend) Court does fine defendant $1000.00. fine due 6-15-96

/s/ Louis R. Lerner

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Robbery (F)
CODE SECTION	:	18.2-58
OFFENSE DATE	:	4/29/96
INDICTMENT NO.	:	1296-219

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Robbery, as charged, in violation of Code Section 18.2-58.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Use of a firearm (F)
CODE SECTION	:	18.2-53.1
OFFENSE DATE	:	8/9/96
INDICTMENT NO.	:	1296-212

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Use of a firearm (F)
CODE SECTION	:	18.2-53.1
OFFENSE DATE	:	4/29/96
INDICTMENT NO.	:	1296-220

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Robbery (F)
CODE SECTION	:	18.2-58
OFFENSE DATE	:	4/29/96
INDICTMENT NO.	:	1296-221

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Robbery, as charged, in violation of Code Section 18.2-58.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Use of a firearm (F)
CODE SECTION	:	18.2-53.1
OFFENSE DATE	:	4/29/96
INDICTMENT NO.	:	1296-222

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Use of a firearm (F)
CODE SECTION	:	18.2-53.1
OFFENSE DATE	:	4/29/96
INDICTMENT NO.	:	1296-224

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Robbery (F)
CODE SECTION	:	18.2-58
OFFENSE DATE	:	4/29/96
INDICTMENT NO.	:	1296-223

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Robbery, as charged, in violation of Code Section 18.2-58.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Use of a firearm (F)
CODE SECTION	:	18.2-53.1
OFFENSE DATE	:	4/29/96
INDICTMENT NO.	:	1296-226

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Maiming (F)
CODE SECTION	:	18.2-51.2
OFFENSE DATE	:	8/9/96
INDICTMENT NO.	:	1296-209

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence as to malicious wounding and reduce on the grounds orally assigned and made a part of the stenographic record of this case, which motion to Court doth deny and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Maiming, as charged, in violation of Code Section 18.2-51.2.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Robbery (F)
CODE SECTION	:	18.2-58
OFFENSE DATE	:	6/28/96
INDICTMENT NO.	:	1296-213

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Robbery, as charged, in violation of Code Section 18.2-58.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Use of a firearm (F)
CODE SECTION	:	18.2-53.1
OFFENSE DATE	:	6/28/96
INDICTMENT NO.	:	1296-214

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Use of a firearm (F)
CODE SECTION -	:	18.2-53.1
OFFENSE DATE	:	6/28/96
INDICTMENT NO.	:	1296-218

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Abduction (F)
CODE SECTION	:	18.2-48
OFFENSE DATE	:	6/28/96
INDICTMENT NO.	:	1296-217

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Abduction, as charged, in violation of Code Section 18.2-48.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Robbery (F)
CODE SECTION	:	18.2-58
OFFENSE DATE	:	4/29/96
INDICTMENT NO.	:	1296-225

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Robbery, as charged, in violation of Code Section 18.2-58.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Use of a firearm (F)
CODE SECTION	:	18.2-53.1
OFFENSE DATE	:	8/9/96
INDICTMENT NO.	:	1296-210

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Use of a firearm, as charged, in violation of Code Section 18.2-53.1.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

DATE: March 7, 1997
JUDGE: Walter J. Ford

COMMONWEALTH OF VIRGINIA

vs. CASE NO.: 96-1300

Daryl Renard Atkins, DEFENDANT

DOB: 11/6/77 SSN: 223-47-0073
SEX: Male RACE: Black

OFFENSE	:	Attempted Robbery (F)
CODE SECTION	:	18.2-26 & 18.2-58
OFFENSE DATE	:	8/9/96
INDICTMENT NO.	:	1296-211

CRIMINAL ORDER

Attorney for the Commonwealth	:	Linda Curtis
Attorney for the Defendant	:	J. Robert Harris
Court Reporter	:	Jean M. Brawley

The defendant was present and represented by J. Robert Harris, counsel.

The defendant having previously been arraigned on January 14, 1997, plead NOT GUILTY and doth further waived his right of trial by jury. With the consent of the defendant, concurred in by the Court and the Attorney for the Commonwealth, the Court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motion of the defendant to strike the Commonwealth's evidence, and notes the defendant's exception to the ruling of this Court.

After hearing all the evidence, the Court found the defendant GUILTY of Attempted Robbery, as charged, in violation of Code Section 18.20-26 & 18.2-58.

The imposition of sentence in this case is continued until May 1, 1997, at 9:00 o'clock A.M., pending a presentence report prepared by a Probation Officer of this Court.

The defendant is committed to jail.

S/WALTER J. FORD
JUDGE

Clerk:mhw

VIRGINIA: IN THE CIRCUIT COURT FOR
THE COUNTY OF YORK

COMMONWEALTH OF VIRGINIA	:	CASE NO. 98-8229 (6)
VS	:	
DARYL RENARD ATKINS	:	

Stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and all other incidents during the hearing in the above-styled cause, held in the Circuit Court for the County of York, at Yorktown, Virginia, on August 19, 1999, before the Honorable Prentis Smiley, Jr., Judge of said Court.

DOCTOR STANTON E. SAMENOW

A Yes.

[7] A I did not.

Q Thank you, sir.

Now, did you keep records of your tests of Mr. Atkins?

A Certainly.

Q And you have those, do you not?

A I do.

Q Now, you testified for the direct and direct that you have made the analysis, opinion, that Daryl was of at least average intelligence, is that correct?

A That's true.

Q Now, what test did you administer to determine that, sir?

A As I indicated yesterday, I gave portions of the Wechsler Memory Scale, the selected items of the Wechsler Adult Intelligence Scale, namely, from similarities, vocabulary and comprehension, and I also gave the Thematic Apperception Test, which in itself is not an intelligence test but it certainly does give some indication of a person's use of syntax, language, vocabulary, and these were portions. I want to underscore, and I said this yesterday, portions of those tests.

[8] Q You gave the Wechsler Memory Scale form one, is that correct?

A Yes.

Q And you only gave part of that, is that correct?

A Parts, yes, not the entire test.

Q That test was developed in 1939, was it not, Doctor?

A An old standard, yes.

Q Have there been any improvements in the tests to be administered since 1939?

A I don't know if there is another form of the Wechsler Memory Scale. This is the Wechsler-I, which simply has memory items and attention items. And that was my purpose.

Q So you're not familiar with the Wechsler Adult Scale revised, put out in 1955, you're not familiar with the Wechsler-III, put out in 1998 – not 1998, 1991?

A Well, Mr. Saunders, according to my form here, this Wechsler Memory Scale-I was renewed in 1972 by the Psychological Corporation, so this is not a 1939 or 1940s or 1950s test.

Q Doctor, do you even have the Wechsler-III?

[9] A Are you talking about memory scale?

Q I'm talking about this book right here and the tests that go with it. Do you even have this in your office?

A I don't have that in my office. I thought you were talking about earlier you started to ask me about the memory scale.

Q I asked what you administered.

A Yes.

Q And you did not administer the current state of the art tests or any portion – full portion of that test to Daryl, did you?

A Disagree. That's not true. I did, in fact, take items. I have Doctor Nelson's tests. I know what the similarity items are. I know what the vocabulary items are from the Wechsler-III. It was those items, the same items that Doctor Nelson gave that I administered.

Q You administered the full verbal substance?

A No, as I said earlier, I administered a part of similarities, vocabulary and comprehension.

Q Doctor, you administered parts of

* * *

[13] A I do. I have it here.

Q On page three, approximately halfway down the paragraph.

A Absolutely. I did ask him that.

Q And there is a query that you can ask for that particular question, isn't there?

A Yes.

Q Do you know what the query is that you're – the test says you're supposed to do?

A I don't have the booklet in front of me, but I believe you can ask the person to tell you more.

Q Tell me more about it?

A Yes.

Q But that's not what you said. You said, "How else are they alike?"

A That's absolutely right, Mr. Saunders. I wanted to know if this man knew how the two were alike.

Q All right. Now, that's not the standard practice and not the instructions –

A Absolutely not. I was interested here in what this man knew. That was critical.

Q Doctor, then, if you don't administer this test or these tests in accordance [14] with the instructions, your test results are no good, are they?

A My test results are perfectly good because the man either knows the answer or he doesn't know the answer. And this man is content with sitting there doing the least, and if you push him a little he comes up with the answer in many cases. That is what I wanted to know.

Q You pushed him a lot, didn't you, Doctor?

A I disagree with that characterization.

Q But you pushed him?

A Absolutely.

Q Every time he gave you an answer, you said, "Well, try something else," or –

A No, Mr. Saunders, I didn't say try something else. It is true I would ask him to explain it further, and in the instance that is cited in my report, I did ask how else are they alike. Again, I wanted to know what he knew.

Q Doctor, as far as the – you say you gave him the vocabulary subtest?

A Again, I gave him items from that test.

* * *

[19] THE COURT: I didn't understand what you said.

BY MR. SAUNDERS:

Q And that's probably what happened in this case, isn't it, Doctor, that Daryl got over on Doctor Nelson?

A No.

Q No?

A No, I think that what Mr. Atkins did was typical. He's asked the question. He does the minimum. He gives the minimal answer. That's it. It's consistent with his school records, doing the minimum. I come in, I asked him the questions, I push him a bit, the answers are there. He even voluntarily tells me what pi is.

Q Well, Doctor, it's been your opinion since this book was written that the criminal is solely responsible for his own conduct, correct? That's one of your basic premises of this book, is it not?

A Yes.

Q That they are so intelligent that they can fake mental insanity?

A I have said that that is certainly something that has occurred and that I have

* * *

[26] A I have gone to professional workshops. I give professional workshops in the area for forensic psychology.

Q To whom, to your peers or to police departments and correctional facility people?

A Both. To many, many mental health organizations and professionals. In fact, the American Psychological Association just called me to talk in Boston.

Q They did?

A Yes.

Q So you are a member of the APA?

A That's right.

Q And you are aware of their ethical code, are you not?

A Yes.

Q You are aware that their ethical code says that you shall use the latest tests, are you not, in your evaluations?

A When one is doing a full evaluation with testing, which I was not doing, yes.

Q Well, what were you doing, Doctor, if you weren't performing the function which this Court ordered you to do, what were you doing?

A Mr. Saunders, I was doing exactly [27] what this Court ordered me to do. Mr. Atkins had had the entire battery of tests by Doctor Nelson. I saw no purpose, indeed, I thought it would be a complete waste of time to readminister item by item all the subtests in the Wechsler-III. My objective was to understand the person that I was dealing with.

There was a question or issue of mental retardation. My decision, which I have explained, was to, among other things, administer items of the test. I wanted to know whether Mr. Atkins could answer these items rather than just do what he had been prone to do throughout his life, to do the least, to give a token answer. I wanted to know was this man retarded or wasn't he.

Q Well, Doctor, you had Doctor Nelson's raw material, you recalculated them and saw that the test scores were accurate and then, of course, you get to the adaptability part, correct?

A Right.

Q Now, whom did you talk to who had seen Mr. Atkins in the general society?

A Nobody.

Q So his adaptability test is that he can run a washing machine, is that correct?

[28] That's part of your decision that he's adaptable in society because he can run a washing machine?

A I had read that he couldn't do anything much for himself. He can wash his clothes, he can dry his clothes, he can cook. Since he was living with a parent and not self-supporting, there really wasn't much else to ask about.

Q Well, did you ask whether he could drive a car? Did you ask whether he could change bus routes on his own? Did you ask if he had a banking account, whether he could add a checking account balance?

A Well, I knew that he did not drive a car because he did not have a license. I knew that he could count money and make change, and he knew what the tip was in a restaurant because I asked him about those things.

Q Tell me, Doctor, do you have children?

A Yes.

Q How old are your children?

A They are in graduate school.

Q When did they first learn what a tip was, at what age?

A I don't remember, pretty young.

* * *

[31] A Not always. There are kids who do very well in school. In fact, there are kids who go on to college and even graduate school, do very well, but they are still committing crimes and doing irresponsible things on the side. So there are different patterns.

Q But the ones who don't do well in school, you can document that – that conduct through their school records, correct? That's one of your premises in this book, isn't it?

A Would you repeat that. I want to be sure I'm –

Q The ones that do not do well in school, all right, you can document a pattern of conduct through the school records, such as fighting, being expelled, showing that this is something that just built right on up, can't you?

A In some cases.

Q Do you see anything in the records that show that Daryl Atkins had been expelled for fighting?

A No, not that he was expelled for fighting.

Q All right. You saw a number of comments that he could do better in school?

[32] A Oh, absolutely.

Q And that was the teachers' opinion, correct?

A Yes.

Q You noticed the opinion written on his second grade card – report card when he was held back in the second grade, did you note that?

A I recall he was held back. I don't recall which comment you are speaking of.

Q I'm talking about the comment where the teacher said the third grade was too difficult for him.

A I don't recall that. I assume that was true if he was held back, that the teacher thought that, she wrote it.

Q All right, Doctor. When you're appointed to – as defense mental health expert, what's your job there?

A Are you talking about in a capital case?

Q In a capital case, yes, sir.

A Well, it's the same.

Q The same?

A Yes, to talk to the defendant and it is to try to find out if there are mitigating

* * *

[40] advantageous for an individual to be able to drive an automobile in a criminal field, wouldn't it?

A Generally.

Q And it would be in their interests to do that, wouldn't it?

A I don't know how to answer that, it depends on the person and on the situation.

Q Well, you reviewed Daryl Atkins' records, didn't you?

A He failed driver training.

Q Absolutely, didn't he?

A Yes.

Q Did you find anything in there like war stories, war classes or anything, where he actually performed any better? What classes did he perform better on? Excuse me.

A This is back in 1992 and '93 where the teacher wrote, great job in improving science, health and writing, and it showed a final grade of C in science, final grade of B in health, final grade of B in – I believe it's computers, and a final A in writing.

Q Well, Doctor, do you know what school that was in?

A This particular paper just says [41] Hampton City Schools, Buckroe School.

Q All right. Do you have the next year's grades for the tenth grade at Bethel High School?

A I'm sure I do. These seem to be – seem to be out of order here. So if you have it and can show it to me, that might save some time.

(A document was exhibited to the Commonwealth Attorney by Defense Counsel and then presented to the witness.)

THE WITNESS: Yes, his final grades here were two D's and two C's.

BY MR. SAUNDERS:

Q All right. Now, do you know what he made in the next year, what his grades were in the next year?

Do you have the accumulative grades for 1992 to 1993, '93 to '94, '94 to '95?

A I probably do, because I have the whole thing. I have up through '95-'96.

Q And what were his grades?

A A, B, C, D, C, C.

Q In what year, Doctor?

A '95-'96.

* * *

[45] THE COURT: Thank you, sir.

Mr. Hahn, any redirect?

MR. HAHN: I have a few questions.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. HAHN:

Q Doctor Samenow, I wish to rephrase slightly the question asked to you by Defense Counsel regarding the dangerousness of Daryl Atkins in the prison system. When he asked you what risk he would pose to society,

you said none unless he escapes. What risk would he pose to the guards and the inmates and the other personnel within that prison system?

A Well, Mr. Hahn, this man has a history of violence that predated the capital murder conviction. He has a history of violence with a firearm. He is a man who told me that he is angry all the time just at being in prison. He is a man who also told me that he thinks he has special powers in the sense that he has knowledge that is superior to other people. He has an extremely inflated view of himself.

[46] He has no remorse, or at least he expressed no remorse for anything that he had done, even denying that he had committed two crimes for which he has been convicted. So this man has not even faced up to what he's done. He sees it to be a rank injustice that he's locked up. He has a history of violence.

He's young, and he believes that he has special knowledge and, in a sense, special abilities. I think these are significant risk factors for further violence in prison.

Q Doctor, how long have you been giving IQ tests?

A Since 1964.

Q Is that 35 years?

A Yes.

Q Roughly. These few questions, or the select questions, you gave, did you use the same questions that Doctor Nelson did?

A Yes, certainly.

Q I mean, you had his questions?

A Yes.

Q And you used those?

A Absolutely.

Q All right. Did you base your [47] opinion on the Defendant's intellect solely upon the results of his tests that you gave him during your interviews?

A Absolutely not.

Q What else did you rely on?

A Well, as I testified yesterday, this man had knowledge of current events, knew who the governor of the State of Virginia is. He knew correctly the year that John Kennedy – John Kennedy was president, 1961. I cited many examples of words that he used correctly in syntax: Parable, decimal, reciprocal fractions, orchestra. I also cited that he could put together stories with cause, effect, past, present, and future. And so – and he also talked freely, developed ideas, concepts.

I didn't have the same experience Doctor Nelson did, apparently, according to his report, where the Defendant was hard to get answers from him. In fact, at the conclusion of the second interview, I had to terminate the interview because Mr. Atkins was talking extremely freely, and we had to get out of that room because it was scheduled for another purpose. So he was extremely verbal.

Q Defense Counsel also asked you about did you see any pattern of expulsions or [48] anything in the school records, and you said no. Did you see any other type of pattern in his school records?

A Well, there were observations. And there were suspensions. There was skipping class and there was loitering, many tardies, but really, the issue that I think is most germane is not that. But it has to do with the school record that is replete with examples of how little motivated he was, how little incentive there was to do what was being asked of him.

The teacher comments overwhelmingly have to do with attitude, motivation, lack of application, not ability. In fact, I cited the statement, you can do better, or Daryl can do better, as an example of where a teacher had concluded that Daryl Atkins was not working up to what he could. So it wasn't a matter of a lack of ability. It was a matter of a lack of performance.

MR. HAHN: I have no further questions.

THE COURT: All right. Thank you. Any recross?

MR. SAUNDERS: Short, your Honor. Short.

* * *

Virginia Department of Corrections

Presentence Investigation Report

Offender Information

District Number P34

Date of Sentencing October 26, 1999

Prepared By Pamela W. Dickerson

Date Prepared October 18, 1999

OFFENDER SUMMARY

Offender's Name (Last, First, Middle)
ATKINS, DARYL RENARD

Nickname/Street Name Daryl, "D"

Alias (AKA) N/A

Maiden Name N/A

Race	Sex
Black	Male

Place of Birth (City or County)	LOC/	State
Hampton	650	VA

Age	Date of Birth
21	11/06/1977

Social Security Number 223-47-0073

State ID Number (CCRE) VA1045218T

FBI Number 109074DB6

Permanent Address VA Dept. of Corrections,

Local Address (if different)

COURT INFORMATION

Court	Judge
YORK	Honorable Prentis Smiley Jr

Prosecuting Attorney Addison, E./Hahn, B.

Defense Attorney Rogers, G./Saunders, B

Type of Counsel
[✓] Court Apponted [ ] Retained

Date of Conviction 02/13/1998

Method of Adjudication
[ ] Guilty Plea [ ] Judge [✓] Jury

Pretrial Status
[ ] On Bond [ ] Own Recognizance
[✓] Confinement [ ] Third Party Release
[ ] Confined on Other Charge

Source of Bond
[ ] Personal [ ] Family [ ] Other [ ] Bondsman
[✓] N/A

Post Trial Status
[ ] Not Confined
[✓] Confined

Pretrial Jail Status
From: 08/21/1996 To: 02/26/1999

OFFENSE INFORMATION

	Docket Number	Offense at Indictment
1.	CR96-8229-01	MURDER Capital Robbery or attempted robbery

Offense Code (VCC)	Plea Per Offense
MUR0933F1	Not Guilty

Offense at Conviction	Offense Code (VCC)
1. MURDER Capital Robbery or attempted robbery	MUR0933F1

Plea Agreement	Virginia Code Section
No	18.2-31(4)

CODEFENDANTS

Names (Last, First, Middle)	Disposition
1. Jones, William A	First Degree Murder & Use of F/A: Sentenced on 2/26/98 to Life plus 5 years

MOST SERIOUS OFFENSE INFORMATION

Most Serious Offense at Indictment
MURDER Capital Robbery or attempted robbery

Offense Code (VCC)
MUR0933F1

Offense Date 08/17/1996

No. of Co-Defendants 1

Resisting Arrest Charge No

Type of Offense
[✓] Person [ ] Property [ ] Other

Legal Status at the Time of Offense
(Check all that apply)
[ ] Escaped [ ] Inmate [ ] Mandatory Parole [ ] Discretionary

Parol [ ] Probation [ ] On Bond [ ] Summons [ ] Released on Recognizance [ ] Post-Release [ ] Community Program [ ] Good Behavior [ ] Unsupervised Probation [ ] Juvenile Probation [ ] Missing/ Unknown [✓] Other [ ] None

Weapon Use
[ ] None [✓] Used to Injure [ ] Used To Threaten [ ] Possession

Weapon Type
[✓] Firearm [ ] Knife [ ] Explosive [ ] Simulated Weapon [ ] Other [ ] N/A

Offender's Role in Offense
[ ] Alone [✓] Leader [ ] Accomplice [ ] Not Determined

Current Arrest Date 08/21/1996

MOST SERIOUS OFFENSE VICTIM INFORMATION (CRIME AGAINST PERSON)

Injury to Victim
[✓] Death [ ] Serious Physical [ ] Physical [ ] Emotional [ ] Threatened [ ] N/A

Victim Relationship to Offender
[✓] None [ ] Friend [ ] Family [ ] Police Officer

Physically Handicapped Victim
No

Victim Information
Sex M Race White Age 21

Victim Impact Statement Requested
If Yes, Attach to Last page of PSI
Yes

Alcohol/Drug Use At time of Offense
[ ] None [✓] Both [ ] Alcohol
[ ] Drug [ ] Unknown

Drug Offense
Primary Drug N/A Secondary Drug N/A
Amount Amount

Narrative of Current Offense

COMMONWEALTH'S VERSION

Reports from the Commonwealth's Attorney's file revealed the following information concerning the present offense:

On August 16, 1996, Airman Eric Michael Nesbitt, age 21, left his part-time job at Advance Auto in the City of Hampton, Virginia sometime between 11:00 P.M. and 11:30 P.M. to return to his residence on Langley Air Force Base. On the way home he stopped at the 7-Eleven Store located on Armistead Avenue near Butler Farm Road, in the City of Hampton. While at this location the Defendant, Daryl Renard Atkins, and Codefendant, William Alfredrick Jones, entered Nesbitt's vehicle and abducted him at gun point. Nesbitt was driven to the Crestar Bank branch located at Coliseum Crossing, in the City of Hampton. On August 17, 1996, at 12:16 A.M., $200 was withdrawn from Nesbitt's account using the ATM. Bank security cameras captured Nesbitt seated between Jones and Atkins. Jones was driving Nesbitt's pickup truck, and Atkins was seated on the opposite side of Nesbitt (nearest the passenger door) with what appeared to be a firearm in his hand.

After leaving the Crestar Bank, Nesbitt was driven to an isolated location on Crawford Road in York County, Virginia where he was shot eight times with a .380 caliber handgun. Nesbitt's dead body was discovered at 4:45 A.M. on August 17, 1996, on Crawford Road.

Photographs of Nesbitt accompanied by Atkins and Jones, were distributed to the news media and Crime Line. Various responses from the community identified Atkins and Jones, and promising leads were developed. Atkins was arrested on August 21, 1996, at his father's residence in the City of Hampton. He was recovering from two gunshot wounds to his left ankle, sustained in the commission of this crime. Jones was arrested on August 22, 1996, at room 578 of the King James Hotel located in the City of Newport News, Virginia. Nesbitt's vehicle had been recovered from this location the previous day.

OFFENDERS VERSION

The following version was taken from the presentence report completed April 15, 1998 by Probation and Parole Officer Dale Jacobson for the York County Circuit Court:

Daryl Atkins advised that around 11:00 A.M. on the morning preceding the offense he and the co-defendant – William Jones, began consuming Gin whiskey mixed with juice, bottles of forty ounce "Blue Bull" malt liquor, and smoking marijuana laced with cocaine. This was at his (Atkins') residence; 1 Sacramento Drive, Apartment 89, in the City of Hampton. At around 5:00 P.M. that same day a friend "Ahad" came over. Ahad also shared in the drinking and smoking. Ahad had a vehicle and he drove Atkins, Jones, and another individual; Mark Dallas, to the

Alcohol Beverage Control (ABC) store. Atkins did not elaborate on what time Dallas originally arrived. He did state that by the time the foursome went to the ABC store, he and Jones had already consumed a large quantity of alcohol and drugs. Leaving the ABC store, Ahad dropped off Atkins, Jones, and Dallas back at Atkins' residence. This was around 8:00 P.M. The remaining threesome continued to consume alcohol; sharing approximately one more pint of Gin and juice. At this point, Dallas advised that he needed to quit drinking in order to be able to go to work the following morning for his first day on the job at Burger King. Although he quit drinking, Dallas stayed at Atkins' residence a while longer. During this time, Atkins and Jones continued to consume alcohol.

Eventually Dallas stated he was ready to go home. Jones then asked Dallas if he could use his handgun. Because Dallas lived so close to Atkins, he went home, returned with the weapon, and handed it to Jones. Dallas then left again and did not return. Atkins and Jones proceeded to consume another pint of Gin and juice. Around midnight, Atkins and Jones ran out of alcohol and drugs. According to Atkins, he alone had consumed around $30 to $50 dollars [sic] worth of marijuana, $10 worth of cocaine, $50 worth of Gin and juice, and 5 or 6 bottles of forty ounce malt liquor.

White [sic] Atkins never asked Jones why he had Dallas' handgun, he felt he knew what Jones had in mind. The two decided to walk to the nearby 7-Eleven. Jones indicated he was going to rob someone to get more alcohol. Atkins offered to go along. Atkins then described to Jones how they could go about obtaining a victim for a robbery. Atkins explained that Jones should wave or holler at the

potential victim in order to get him or her to stop. Jones should then approach the victim and only when close enough should he produce the weapon.

Upon arriving at the 7-Eleven, Atkins and Jones waited off to the side of the building until they saw Eric Nesbitt pull into the parking lot. They waited for him to exit the 7-Eleven and enter his pickup truck. Jones then approached Nesbitt from the driver's side of the vehicle and asked if he (Nesbitt) had any, or knew where to get any weed (marijuana). When Nesbitt paused to respond, Jones produced the handgun, instructed Nesbitt to slide over to the middle of the truck, and instructed Atkins to get in the passenger side of the vehicle. Jones then handed the weapon to Atkins and drove the vehicle out of the parking lot.

At this time Atkins told Nesbitt to produce his wallet. Nesbitt handed it to Atkins, and Atkins removed $60 dollars [sic] which he in turn handed to Jones. Nesbitt then advised that he could get more money via his automatic teller machine (ATM) card. At some point early in the abduction and robbery, Jones drove the truck into a parked car. This caused damage to the driver's side door of the truck, but Atkins does not believe that it affected the ability of the door to open. Jones then drove the truck to the Crestar Bank ATM located at Coliseum Crossing. There, Atkins held the weapon on Nesbitt, while Nesbitt reached across Jones to complete the ATM transaction. This produced an additional $200. The money and Nesbitt's wallet were all held by Jones.

At this time Jones debated aloud what he should do with Nesbitt. Atkins remembers Nesbitt stating he knew a

place where they could take him that would be impossible to return from in under two days. Jones then stated he knew a place where he could take Nesbitt and tie him up. Jones then drove toward Interstate 64 and traveled west until he exited at Lee Hall. He then traveled east on Route 238 (Old Williamsburg Road) until he turned onto Crawford Road. Atkins never knew where they were going.

During the trip up the interstate, along Old Williamsburg Road, and onto Crawford Road, Atkins remembers rock and roll music playing in the truck. He further remembers Nesbitt reaching behind himself to a container behind the seat which held cassettes or compact disks. Nesbitt is said to have changed the music at least once. Also during this time very little was said by anyone in the truck. Atkins remembers telling Nesbitt that he wasn't going to hurt him, and he remembers Jones asking Nesbitt if he had a wife or any children.

Driving along Crawford Road, Jones stopped the truck where Tower Road intersects from the left. At this juncture, Jones told Atkins to return the weapon and then for both Atkins and Nesbitt to get out and switch places upon re-entry. Atkins handed the weapon back to Jones, and then both Atkins and Nesbitt complied with the second instruction. Jones, at this point placed the weapon in a left side holster, and backed the truck up about two hundred feet. Jones then took the weapon out of the holster and ordered Nesbitt to reach across both Atkins and himself to open the driver's door. To do this, Nesbitt had to use both hands; one hand to operate the lock which was just below shoulder height toward the back of the door, and one hand to pull open the handle of the

door. During this time, Jones was holding the weapon in his left hand and pointing it at Nesbitt.

Jones exited the vehicle and instructed Nesbitt to do likewise from the passenger side. Atkins was attempting to follow Nesbitt when Jones appeared on the passenger side of the vehicle in front of Nesbitt. Nesbitt crouched down. Jones ordered Nesbitt to stand up, and then immediately began firing the handgun at Nesbitt. One of the bullets struck Atkins in the leg, Nesbitt fell to the ground just outside of the truck. Jones then returned to the driver's side of the truck and got in.

While driving away from the scene of the murder, Atkins told Jones that he had been shot and that he needed to go to the hospital. Jones, at first, declined. Atkins promised he wouldn't tell anyone how he had been shot, and Jones did eventually drive him to the hospital. While en route to the hospital, Atkins advised Jones that he would need transportation money from the hospital. Jones gave Atkins $20, and dropped him off at Riverside Hospital in Newport News, Virginia. Atkins advised the hospital security officer that he had been robbed and shot at Deer Park, and that he had hopped on one leg all the way to the hospital. Atkins denies ever making any statement to any hospital nurse.

CO-DEFENDANT'S VERSION (as stated in William Jones' presentence investigation report)

William Jones advised that on August 16, 1996, he had met with Atkins and the two began drinking alcoholic beverages and smoking marijuana beginning at 11:00 A.M. He indicated that he had consumed six or seven 40-ounce beers and two bottles of gin mix beverage.

He advised that he had known Atkins for approximately two months before the offense. Jones reports that there were several other friends drinking with him and Atkins but towards the end of the evening the other people left. Jones reports that Atkins went to the apartment of an associate and borrowed a gun for his own protection. Atkins and Jones decided to walk to the 7-Eleven to purchase some more beer. After arriving at the 7-Eleven, Jones claims that Atkins advised him that he did not have enough money to purchase any beer and would have to "panhandle." After being at the 7-Eleven for a short while Jones claims that Nesbitt pulled up in his pickup truck and entered the store. Jones claims that on the way in Atkins asked Nesbitt for some money but was not sure of Nesbitt's response. Nesbitt left the 7-Eleven store a short time later and entered his pickup truck. As he was backing out of the parking lot Atkins whistled and Nesbitt stopped. He claims that Atkins entered the passenger's side of the pickup truck with his firearm and motioned for Jones to enter the vehicle and drive. After Jones entered the pickup truck he began to drive on Armistead Avenue. Jones claims that Nesbitt provided $20 but when told this was not enough money, he advised that he had an ATM card from Crestar Bank. At this time they drove to Crestar Bank and withdrew $200. After the money was withdrawn Jones claims that he asked Atkins what he planned to do with Nesbitt. According to Jones, Atkins advised him that they were going to drive him to York County and tie him up. Jones drove the vehicle to Crawford Road and stopped when told to do so by Atkins. At this time Atkins departed the truck with Nesbitt and began firing the weapon at him. Jones claimed that he

jumped out of the truck and began wrestling with Atkins for the gun. During the struggle the gun discharged and Atkins was shot in the leg.

Juvenile Criminal History

JUVENILE RECORD
Prior Juvenile Record Yes

Type of Record
[✓] Delinquent [ ] Status [ ] Both

Age at First Juvenile Delinquent Adjudication
14

Number Prior Juvenile Delinquent Adjudications
Crimes Against Person 2
Crimes Against Property 2
Drug Crimes 0 Other 0

Type of Disposition(s)
[✓] Probation [ ] Revoked
[ ] State Ward [✓] Other

Verified Information Yes

Source of Information if Unverified
[ ] Family Member [ ] Defendant [ ] Other

Narrative of Juvenile Criminal History

The following information was taken from the April 1998 presentence report prepared for the York County Circuit Court:

On January 22, 1992, in the Juvenile and Domestic Relations Court for the City of Suffolk, Virginia, Daryl Renard Atkins, then age 14, was adjudicated delinquent for having committed the crimes of Break and Enter, and Petit

Larceny. He was placed on supervised probation, ordered to pay $50 restitution, and attend a program known as Straight Talk. His supervision was immediately transferred to the City of Hampton. The following year he was released successfully from probation

On September 8, 1995, in the City of Hampton, Atkins, then age 17, along with two other individuals approached Aaron Griffith and Michael Consentino in the woods behind Bethel High School. Atkins asked Griffith for his money and received five dollars. The other two individuals took clothes, money, and watches from Consentino.

In the course of the 1996 pre-disposition report Atkins advised having previously robbed someone, but that the Griffith robbery was unplanned. During the 1998 interview with Dale Jacobson, for the purposes of the presentence report related to the instant offense, Atkins advised having been involved in approximately five robberies as a juvenile, always without a firearm, and always as a follower.

On January 12, 1996, in the Juvenile and Domestic Relations Court for the City of Hampton, Virginia, Atkins, then age 18, was adjudicated delinquent for having committed the crimes of Grand Larceny from Person (two counts). This adjudication reduced the charges which were originally two counts of Robbery. Atkins was ordered to serve 120 days in jail (to be served on weekends, if possible), and given a fine of $1,000.

Still in 1996, but after having been arrested by authorities for the City of Hampton, and York County, Atkins was returned to court in light of his failure to serve all of his

jail sentenced [sic]. The matter was nolle prossed on motion of the Commonwealth on October 7, 1996.

This information was shared with Ms. Bullock (Defendant's mother) who stated her agreement.

Adult Criminal History Summary

ADULT RECORD
Prior Adult Record Yes

No. of Prior Felony Sentence Events 2

No. Prior Felony Convictions For:

Crimes Against Person	Property Crimes	Drug Crimes	Other
10	2	0	11

No. of Prior Felony Convictions For Instant Offense at Conviction
0

No. of Previous Felon Commitments
Virginia 2 Out-of-State 0

Most Recent and Serious Prior Criminal Adult Convictions

	Description		Offense Code (VCC)
1.	KIDNAPPING Pecuniary Benefit Extortion, abduct wit	1.	KID1012F2
2.	ASSAULT Malicious Wounding Stab, cut, wound w/mali	2.	ASL1336F2
3.		3.	
4.		4.	

5. _____ 5. _____

No. of Prior Probations
Completed 0 Revoked 0

No. of Prior Paroles
Completed 0 Revoked 0

No. of Prior Incarcerations Received
Under One Year 0 One Year or More 11

Last Previous Arrest Date
(Or Release From Confinement)
09/08/1995

No. Prior Misdemeanant Convictions
Criminal 0 Criminal Traffic 0

Narrative of Adult Criminal History Summary

On February 9, 1998, Daryl Atkins pled guilty to Robbery, Abduction and 2 counts of Using a Firearm during the Commission of a Felony in the York County Circuit Court. He pled not guilty to Capital Murder and one count of Use of Firearm. On February 13, 1998, he was found guilty of those charges by a jury. He was sentenced on April 28, 1998 to the Death Penalty for the Capital Murder and sentenced to Life in prison for the Abduction and Robbery. He received 5 years in prison on each of the three counts of Using a Firearm. On February 26, 1999, by order of the Supreme Court of Virginia, the Capital Murder conviction of February 13, 1998 was affirmed, although the sentence of death was reversed and annulled, and remanded back to the York County Circuit Court for a new sentencing trial. On August 19, 1999, a jury again sentenced him to the Death Penalty for Capital Murder which is the subject of this report.

The following information regarding Daryl Atkins prior adult criminal history is taken from the April 1998 presentence report prepared for the York County Circuit Court:

Nearly all of Daryl Atkins' adult criminal history involves violence or the threat of violence. In all but one of his previous episodes of documented adult criminal activity a handgun played a role. Substance abuse appears to have played a role as well.

In discussing his adult criminal history with Dale Jacobson, Daryl Atkins denied any involvement in the crimes against Shane Stoops and Amanda Hamlin, but did admit his guilt in the crimes against Shavonda York and Kevin Phillips. In the York case he offered the name of William Jones as his codefendant. In the Phillips case he continued to withhold the names of his codefendants.

What follows are narratives of Atkins' offenses described in the May 1997, presentence investigation report completed by Probation and Parole Officer Mary Knight for the Hampton Circuit Court:

Robbery, Abduction, Use of a Firearm in the Commission of a Felony (2 counts)

On June 28, 1996, Kevin Phillips was making a Chanellos Pizza delivery to 30 Sacramento Drive in the City of Hampton. As he drove up the house was dark, but he saw a black male coming from the house waving to him. Phillips approached the man, who was standing between the door and the screen. As he got closer, three other black men came from around the side of the house. These three men were all wearing masks. Two of these men

went to the car and one put a gun to Phillips' head. The unmasked man stood behind Phillips and went through his pockets. Phillips' wallet, $20 of store money, and about $6 in change was taken.

Corporal Browning of the Hampton City Police questioned Atkins about several Hampton offenses. Atkins acknowledged his participation in this case stating he was the man without the mask. When Probation and Parole Officer Jacobson questioned him about his codefendants, Atkins again chose to remain silent.

Break and Enter, Grand Larceny

Shavonda York left her town home at 6 Carmine Place in the City of Hampton at approximately 6:00 A.M. on June 4, 1996. When she arrived home at 5:00 P.M., she discovered that criminal entry had been gained via breaking the latch on a rear kitchen window. Property taken included a television, VCR, leather coat, and jewelry (gold watch and a ring with the initial "I").

Corporal Browning of the Hampton City Police questioned Atkins about several Hampton offenses. Atkins acknowledged his participation in this case stating he and William Jones broke a latch on a back window at a town home near Machan School. Atkins further admitted taking all of the above mentioned items as well as a class ring. When Probation and Parole Officer Jacobson questioned Atkins as to why he was willing to advise law enforcement of Jones' participation in a Break and Enter, and Grand Larceny case, but not to divulge the names of his codefendants in a Robbery, and Abduction case, Atkins declined to respond.

Robbery (4 counts), Use of a Firearm in the Commission of a Felony (4 counts)

Shane Stoops, Scott Thompson, Dennis Tuinei, and John Hultquist were out celebrating Stoops' 21st birthday. Sometime after midnight on April 29, 1996, they were in Hultquist's automobile and decided to call an escort service. Hultquist and Thompson dropped off Stoops and Tuinei at a pay telephone in front of Almost A Bank at 902 West Mercury Boulevard, in the City of Hampton. Hultquist and Thompson then drove to a cash machine. When they returned, Tuinei was still talking on the telephone. All four men were standing around the telephone when three black males approached. Tuinei hung up the telephone and the original four men started to get back into Hultquist's automobile when one black male said, "Nobody move." Another black male (not the defendant) had a handgun. The victims were told to empty their pockets and get on the ground. The victims were all robbed of money and wallets. Detective Burton of the Hampton City Police prepared a "photo spread" and showed it to the victims. All four identified Atkins.

Aggravated Maiming, Attempted Robbery, Use of a Firearm in the Commission of a Felony (2 counts)

On August 9, 1996, at approximately 8:00 P.M., Amanda Hamlin finished mowing her lawn at her home at 934 Aberdeen Road, in the City of Hampton. She was approached by a man wearing a handkerchief on his face, and carrying a handgun. The man instructed her to lay down, then proceeded to drag her by the arm to the front of the house. He hit her with the gun, asked her who was in the house, and although her teenage daughter was

home, she answered, "no one." Atkins then shot her in the stomach and ran across Aberdeen Road and got into an Acura. Hamlin was taken to Riverside Hospital where she had surgery to resect her bowel. The bullet could not be removed. She was not released from the hospital until August 31, 1996. Corporal Browning of the Hampton City Police interviewed Atkins about this crime. According to Browning, Atkins admitted this crime, stating he was trying to rob Hamlin. Atkins advised Probation and Parole Officer Jacobson that Browning tricked him into confessing by telling him (Atkins) that if he didn't admit guilt he would be charged with the offense, but if he did admit guilt he wouldn't be charged.

Atkins has been incarcerated since his arrest on August 21, 1996. He was sent to Mecklenburg Correctional Center on April 28, 1998 and to Sussex I State Prison on August 3, 1998, where he currently remains. According to the Subject's counselor at the prison, he has had 4 disciplinary actions, 3 of which were dismissed. On June 4, 1999, he was sited for disobeying a direct order and received a 30 day loss of commissary privileges.

Family/Environmental Information

MARITAL/RESIDENTIAL STABILITY

Number of Dependents 0

Marital Status
[✓] Single/Never Married [ ] Married
[ ] Separated [ ] Divorced [ ] Widowed
[ ] Divorced/Remarried [ ] Widowed/Remarried
[ ] Other

Living Status
[ ] Alone [ ] Single Parent/Head of House
[ ] With Spouse [✓] With Parents/Other Relative
[ ] Other

Length of Residence at Current Address
Years 0 Months 3

Length of Residence in Local Area
Years 18 Months 10

Length of Residence Apart from Parents
Years 0 Months 0

Has Any Member of Offender's Family Ever Been Convicted of a Felony?
Yes

Spouse Name/Address
N/A

Narrative of Family/Environmental Information

A 1997 presentence investigation report written for the Hampton Circuit Court indicates the following:

Father: Philip Atkins, Jr., – age 48. He now resides at 189 Pine Chapel Road in the city of Hampton. He is a high school graduate and a twenty-eight year employee of the Newport News Shipyard, as a sheet metal worker. He is believed to be free of substance abuse or any criminal record.

Mother: Elvira Bullock – age 44. She resides at 217 Ridge Wood Drive in the city of Hampton. She too is a high school graduate, and has a record of twenty-one years service with C&P Telephone. Furthermore, she is also believed to be free of substance abuse or any criminal record.

Step-Father: Michael Bullock, Sr. – age 45. He brought two children of his own to this union with the Defendant's mother. His son, Michael Jr., died in 1994, at age 17, due to an asthma attack. His daughter, Tracy, is married with children and living in Chesapeake, Virginia.

Daryl Atkins' natural parents separated in 1985, and were divorced one year later. In 1989 his mother re-married. According to a 1996 pre-dispositional report written for the Hampton Juvenile & Domestic Relations Court, he enjoyed a good relationship with both his natural father and step-father, and was respectful to his mother for most of his childhood. During his last year at home he began to place a greater emphasis on acceptance by his friends. His relationship with his mother, at this time, deteriorated. His use of illegal drugs became apparent to her as well. Lastly, his step-father was incarcerated. Only a few months prior to the instant offense he moved in with his natural father at 1 Sacramento Drive; number 89, in the city of Hampton. While living at his father's residence, he continued to consume illegal drugs and alcohol, did not work, and continued to place his friends over family.

Ms. Bullock, in a telephone conversation with Dale Jacobson on March 26, 1998, indicated her agreement with all of the above except for information specific to activities at her ex-husband's residence, of which she is without first hand knowledge.

Offender Personal History

EDUCATION

Highest Education Achievement Years
11 Years

Name/Location of Last School Attended
Bethel High School,
1067 Big Bethel Road,
Hampton, VA 23666, (757) 825-4400

Education Narrative

The following information is taken from the April 1998 presentence report prepared for the York County Circuit Court:

Daryl Atkins dropped out of Bethel High School in the spring of 1996, while enrolled in the twelfth grade. At that time he was academically ranked 347 out of a class of 371 with a 1.26 grade point average. He had previously failed and repeated both the second and tenth grades. According to a Hampton Circuit Court presentence investigation report prepared in April of 1997, Daryl Atkins indicated he dropped out of school because he "was involved with drugs, hanging around with the wrong crowd, and not interested in school."

He was placed in special programs for assistance in passing the Literacy Passport sub-tests for reading and math.

While it appears that he was, throughout his high school tenure, enrolled in sixteen courses that had no grade point average (GPA) weight, he was also in ten courses with a GPA weight considered as basic, nineteen courses with a GPA equal to average, and two courses with a GPA consideration of College Prep/Honors. Specific programs

made available to Daryl Atkins through the Hampton City Public School system were Beachside, and Bridges. It is the latter program which is credited with helping him to advance to the twelfth grade. Furthermore, he was near graduation when he dropped out of school. It is reported that he was easily distracted, had a short attention span in school, and was a slow learner.

MILITARY HISTORY

N/A

Current Military Status
[ ] None [ ] Reserve [ ] Active

Length of Service
Years Months

Dates of Service
To

Type of Discharge
[ ] Honorable [ ] Medical [ ] General
[ ] Undesirable [ ] Bad Conduct [ ] Dishonorable
[ ] Member at Time of Offense [ ] None
[ ] Unknown

Military History Narrative

SOCIAL/RELIGIOUS ACTIVITIES

Social Activities
[ ] None Specified [ ] Constructive
[✓] NonConstructive

Religion
[ ] Active [✓] Inactive [ ] None

Religious Preference
[✓] Protestant [ ] Catholic [ ] Jewish [ ] Other
[ ] Moslem [ ] Muslin [ ] Unknown [ ] No Preference

Social/Religious Activities Narrative

The following information was taken from the April 1998 presentence report prepared for the York County Circuit Court:

Daryl Atkins claims to have previously been a member of the Morning Star Baptist Church in Hampton, Virginia. He had not however, attended services for some time prior to his incarceration. In the months prior to his incarceration he was heavily involved in street drug and alcohol use. Ms. Bullock advised that her son attended church services and Sunday school on a regular basis until the spring of 1996.

Offender Personal History Continued

EMPLOYMENT HISTORY

Employment at Time of Offense
[ ] full time [ ] Part Time [ ] Full Time Student
[ ] Housewife [ ] Retired/Disabled
[✓] Unemployed

Type of Employment
[ ] Skilled [ ] Semi-Skilled [ ] Unskilled
[ ] Student [ ] N/A

Description of Occupation
UNEMPLOYED

Occupation Code 904

Length of Longest Employment
Years 0 Months 0 [ ] N/A

Longest Employment Period Within Past Two Years
Years 0 Months 0

Employment Record Over Past Two Years
[ ] Regular, Few Changes [ ] Regular, Many Changes [ ] Irregular [ ] Odd Jobs Only [✓] No Work Record

Employment History Narrative

The following information was taken from the April 1998 presentence report prepared for the York County Circuit Court:

Daryl Atkins has never been employed. According to the 1996 pre-dispositional report authored by Juvenile Probation Officer Anita Manley, Daryl Atkins, at age 18, stated that he was not yet ready to work, but that he would go to work once he knew he was ready.

Daryl Atkins advised Probation and Parole Officer Dale Jacobson that he does not remember ever making such a statement to anyone. He admitted that his mother often asked him to find a job but he generally just walked away without answering. When asked by his father if he was going to find a job he would generally say that he was looking for work simply as a means of ending the inquiry. He claimed that during the time he lived with his father he was receiving an allowance of $20 per week

FINANCIAL STATUS

Residence
[ ] Owner [ ] Rent [✓] Other

Checking Account No

Savings Account No

Gross Monthly Income Claimed $40.00

Total Indebtedness Claimed
$6,881.13

Total Monthly Payments Claimed $0.00

Source(s) of Subsistence
[ ] Job [ ] Public Assistance [ ] Spouse [✓] Family [ ] Other [ ] None

Financial Status Narrative

The following information was taken from the April 1998 presentence report prepared for the York County Circuit Court:

Daryl Atkins became an adult on November 6, 1995. Between then and the date of his arrest for the instant offense it appears he was supported either by family or from what he obtained via crimes he committed in Hampton.

His debts also appear to be the consequence of his criminal activity in Hampton. On May 1, 1997, he was ordered to pay a total of $6,881.13 in combined restitution to three victims. Costs of prosecution were also ordered but the exact amount is unknown as of this writing.

Offender Personal History Continued

HEALTH INFORMATION

Physical Health Condition
[✓] Good [ ] Fair [ ] Poor

Physical Handicaps No

Mental Health Treatment No

Mental Health Commitment No

Type(s) of Mental Health Treatment
[ ] In-Patient [ ] Out-Patient [✓] N/A

Type(s) of Mental Health Committment
[ ] Involuntary [ ] Court-Ordered Evaluation
[ ] Voluntary [✓] N/A

Drug Use Claimed
[ ] None Used [✓] Heavy Use [ ] Moderate Use
[ ] Occasional Use [ ] Extent Unknown

Drug Abuse Apparent Yes

Drug Treatment No

Types of Substances Claimed
[ ] Not Used [✓] Hallucinogens [ ] Heroin
[ ] Opium [✓] Cocaine [ ] Synthetic Narcotics
[✓] Marijuana [ ] Amphetamiens
[ ] Barbiturates [ ] Type Unknown [ ] N/A

Alcohol Use Claimed
[ ] Not Used [✓] Heavy Use [ ] Moderate use
[ ] Occasional Use [ ] Extent Unknown

Alcohol Abuse Apparent Yes

Alcohol Treatment No

Height
5 Ft. 5 In.

Weight
155 lbs.

Color Eyes
[ ] Black [ ] Blue [✓] Brown [ ] Green
[ ] Grey [ ] Hazel [ ] Mismatched [ ] Pink

Color Hair
[ ] Auburn [ ] Bald [✓] Black [ ] Blond
[ ] Brown [ ] Grey [ ] Other [ ] Red
[ ] Sandy [ ] White

Scars, Marks, Tattoos

Birth mark on upper back; tattoo of "D" on right arm; bullet wound scars on lower left leg

Health Information Narrative

The following information was taken from the April 1998 presentence report prepared for the York County Circuit Court:

Daryl Atkins is asthmatic. It is known that his step-brother, Michael Bullock died at age 17 due to an asthma attack. He and his step-brother were reportedly close. Atkins also received a gunshot in the leg during the course of the Instant Offense.

Atkins first began using alcohol in the ninth grade. This soon progressed to marijuana and then to cocaine. He further admitted to Probation and Parole Officer Jacobson that he has used "acid" on at least five occasions both as a juvenile and as an adult. His drugs of choice however were cocaine and marijuana, and he would often use the two together. During all of 1996, prior to his arrest for the

instant offense, his use of cocaine averaged about twice per week while he was using marijuana and alcohol daily. While not realizing at the time that he had developed a chemical dependency, he has since determined that he could have benefited from counseling.

Regarding Atkins' mental state it is unknown if he suffered from any impairment prior to incarceration not now linked to use/abuse of alcohol and illegal drugs. Since being incarcerated, he advised being depressed, though not so much recently as during the early months in jail. In a conversation with Probation and Parole Officer Dale Jacobson on March 8, 1998, when asked to elaborate on his depression, he described what Jacobson inferred to be boredom with the structure and routine of incarceration. He spoke of having nothing to do, and of not worrying about the past because it cannot be changed. He did not however elaborate on any associated feelings. His affect was flat during the whole of the interview, including during his description of the instant offense. He was resigned to the sentence recommended by his Jury. At the conclusion of the interview he stated he was sorry for what had happened to the victim and wished now that things had happened differently on the day preceding the offense. It should be remembered that he and Jones had been drinking heavily during the hours prior to the instant offense. According to Atkins, the two had also been using cocaine and marijuana during this same time period.

Atkins was tested by Clinical Psychologist Evan Nelson, and shown to have an Intelligence Quotient (IQ) of 59, which he states is within the range of Mild Mental Retardation. His school records reveal that he was a poor

student (note his GPA, class ranking, two failed grades, alternative programs such as Beachside, and Bridges, and placement in remedial courses at Bethel High School). He did however, pass the Literacy Passport sub-tests on reading and math, and was in the twelfth grade, approaching graduation, when he dropped out of school.

Community Supervision Plan & Summary

COMMUNITY SUPERVISION PLAN

Residence Plan

[ ] Alone [ ] Parents [ ] Spouse [ ] Spouse/ Dependent [ ] Other Relative [ ] Employer [✓] Other

Residence

Name	VA Dept of Corrections
Address	Administrative Office 6900 Atmore Drive Richmond, VA 23692
Telephone	(804) 674-3000

Employment

Name	N/A
Address	
Telephone	None

Offender's Plan of Restitution
Daryl Atkins is serving a three life sentences, plus 121 years in prison for convictions suspended in the Hampton and York County Circuit Courts. Therefore, no restitution payment plan was discussed.

Offender's Community Plan to Help Self
Information contained in the 1997 presentence investigaton [sic] report indicated Daryl Atkins was seeking counseling for depression and chemical dependency. He previously stated that he spends time each day reading the Bible.

Community Resource Proposed for Offender Assistance
Daryl Atkins should avail himself to counseling offered by the Virginia Department of Corrections. Additionally, he is recommended to speak with representatives of any of the vaious [sic] religious organizations which regularly visit Virginia Corectional [sic] facilties.

Recommendation
[ ] Probation [ ] Community Plan [ ] Incarceration
[ ] Other [✓] No Recommendation

Recommendation Summary

Daryl Renard Atkins is a 21 year old male who now stands before the Court for formal sentencing after having been found guilty of Capital Murder by a jury, with a recommendation for the Death Penalty. Daryl Atkins has been previously sentenced for Abduction, Robbery and three counts of Using a Firearm during the Commission of a Felony, all of which occurred during the Instant Offense. Based on the aggravated nature of these offenses committed against the victim, Eric Nesbitt, this Officer

would defer to the judgement and wisdom of the jury for sentencing.

There are no Sentencing Guidelines for the offense of Capital Murder.

/s/ Pamela W. Dickerson
Probation & Parole Officer
Pamela W. Dickerson

Criminal History Attachment

[redacted]	Offender's Name (Last, First, Middle) ATKINS, DARYL RENARD		
FBI Number 109074DB6	**State ID Number (CCRE)** VA1045218T		**Local P.D. Number**
Race Black	**Sex** Male	**Date of Birth** 11/06/1977	**Social Security Number** 223-47-0073

Criminal History Narrative

Date	Jurisdiction	Charged Offense	Convicted Offense	Sentence Date	Sentencing
	JUVENILE RECORD				
01/22/1992 (S)	Suffolk JDRC	1) Break and Enter	Same	01/22/1992	1) Supervised probation for an indeterminate period, $50 restitution, Straight Talk program.
		2) Petit Larceny	Same	01/22/1992	2) Same
	Suffolk	RELEASED FROM PROBATION BY SUFFOLK COURT SERVICES UNIT			
09/08/1995 (A)	Hampton JDRC	1) Robbery	Grand Larceny	01/12/1996	1) 120 days in jail to be served on weekends if possible - $1,000 fine
		2) Robbery from Person	Grand Larceny	01/12/1996	2) Same
	ADULT RECORD				
04/29/1996 (O)	Hampton CC	1) Robbery	Same	05/01/1997	1) 20 years prison, 10 years suspended for 50 years each, $480 restitution
		2) Robbery	Same	05/01/1997	2) Same
		3) Robbery	Same	05/01/1997	3) Same
		4) Robbery	Same	05/01/1997	4) Same
		5) Use of Firearm in Commision of Felony	Same	05/01/1997	5) 5 years prison
		6) Use of Firearm in Commission of Felony	Same	05/01/1997	6) Same
		7) Use of Firearm in Commission of Felony	Same	05/01/1997	7) Same
		8) Use of Firearm in Commission of Felony	Same	05/01/1997	8) Same
06/04/1996 (O)	Hampton CC	1) Break and Enter	Same	05/01/1997	1) 4 years prison, 2 years suspended for 50 years
		2) Grand Larceny	Same	05/01/1997	2) 8 years prison, 4 years suspended for 50 years, $2,175 restitution
06/28/1996 (O)	Hampton CC	1) Robbery	Same	05/01/1997	1) 20 years prison, 10 years suspended for 50 years each.
		2) Abduction	Same	05/01/1997	2) Same
		3) Use of Firearm in Commission of Felony	Same	05/01/1997	3) 5 years prison
		4) Use of Firearm in Commission of Felony	Same	05/01/1997	4) 3 years prison
08/09/1996 (O)	Hampton CC	1) Aggravated Maiming	Same	05/01/1997	1) Life in prison
		2) Attempted Robbery	Same	05/01/1997	2) 4 years prison, 2 years suspended for 50 years
		3) Use of Firearm in Commission of Felony	Same	05/01/1997	3) 5 years prison
		4) Use of Firearm in Commission of Felony	Same	05/01/1997	4) 5 years prison. $4,226.13 restitution
08/17/1996 (O)	**York County CC**	**1) Capital Murder**	**Same**	**10/26/1999**	**1) Instant Offense**
		2) Use of Firearm in Commission of Felony	Same	04/28/1998	2) 5 years prison
		3) Robbery	Same	04/28/1998	3) Life
		4) Abduction	Same	04/28/1998	4) Life
		5) Use of Firearm in Commission of Felony	Same	04/28/1998	5) 5 years prison
		6) Use of Firearm in Commission of Felony	Same	04/28/1998	6) 5 years prison

Pamela W Dickerson

Probation & Parole Officer
Pamela W. Dickerson

Return By _____

Number _____

VICTIM IMPACT STATEMENT
Commonwealth of Virginia

SECTION 19.2-299.1 OF THE CODE OF VIRGINIA ALLOWS CRIME VICTIMS TO SUBMIT TO THE JUDGE A STATEMENT WHICH DESCRIBES THE IMPACT OF THE CRIME(S) ON THE VICTIM AND HIS OR HER FAMILY. THIS STATEMENT MAY BE CONSIDERED BY THE COURT IN DECIDING A SENTENCE.

PLEASE COMPLETE ALL PARTS OF THIS FORM WHICH APPLY IN THIS CASE. **ADD ADDITIONAL PAGES IF NECESSARY.**

Eric Michael Nesbitt William Jones and Daryl R. Atkins
Name of Victim Name of Defendant

Mary E. Sloan

I. ECONOMIC LOSS

A. Financial Loss

1. Property Loss

List the property lost as a result of this crime. This is property that has not been and is not expected to be recovered. (Attach any relevant receipts)

Item	Make	Model	Cost
stereo CD player	Kenwood		
Amp			$500.00
speakers (box)	pyle		

Total $ _____

2. *Property Damage*
List property damage as a result of this crime. (Attach estimates/bills for repair)

Item	Make	Model	Cost
truck	Nissan	pickup	unknown
damage to left side & interior			at this time

Total $ _____

3. *Medical/Hospital Costs* (Attach copies of bills)

Total $ _____

4. *Other Economic Losses/Costs* (Lost wages and/or income)

Total $ _____

Please specify type of loss _____

Subtotal A: (Property Loss+Property Damage+Medical/Hospital+Other)

= Subtotal A $

B. Reimbursement Received

1. *Property Insurance* (Name and address of insurance company) _____ (1) ____
2. *Hospital/Medical Insurance* (2) ____
3. *Restitution Received* (3) ____
4. *Other Reimbursement(s)* (4) ____

Subtotal B: (Sum of Reimbursements)

= Subtotal B $

C. Economic Loss Not Reimbursed (Subtotal A Minus Subtotal B) **$**

II. PHYSICAL INJURIES

A. Did the victim have any physical injuries as a result of this crime? (Check one)

Yes [ ] No [X]

B. If yes, describe the physical injuries and any medical treatment the victim received.

_____

_____

III. PSYCHOLOGICAL EFFECTS AND TREATMENT

A. Describe any psychological effects of the crime. (Add additional sheets if necessary)
I'm sad all the time, thinking about my loss and the terrible thing that happened to Eric. I'm fearful for the future of my remaining children. A whole new element has been added to my feelings on motherhood. My whole adult life has been devoted to raising my children. I now wonder if it was all a waste. As a mother, you always have hope that your children will grow up and get on with their lives, but now I am filled with an incredible fear that something awful may happen to them like what happened to Eric. I know these feelings of hopelessness would have a bad affect on my children if they knew how I was feeling, so I keep them bottled up. This makes me feel even worse about Eric's death.

I have a hard time sleeping now. I lay awake every night thinking and worrying.

B. Describe any psychological treatment received or needed as a result of the crime
I tried talking to a therapist but felt it was a waste of time to sit there and cry. I don't feel this kind of treatment can handle a problem this big.

IV. LIFE CHANGES

Please describe any changes in your life as a result of this crime

I lost one of my beloved children.

V. ADDITIONAL INFORMATION

Please provide any other information you wish the court to consider about the impact of this crime

_____

_____

_____

[ ] I DO NOT WISH TO MAKE A STATEMENT.

_____

Name and Signature of person completing this form

Mary E. Sloan

Relationship to victim _____

Date of completion of form 2-22-98

(Cite as: 257 Va. 160, 510 S.E.2d 445)

Supreme Court of Virginia.

Daryl Renard ATKINS

v.

COMMONWALTH of Virginia.

Record Nos. 981477, 981478.

Jan. 8, 1999.

Bryan L. Saunders, Newport News; George M. Rogers, III, Washington, DC, for appellant.

Pamela A. Rumpz, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for appellee.

Present: All the Justices.

KOONTZ, Justice.

In this appeal, we review the capital murder conviction and death sentence imposed by a jury on Daryl Renard Atkins.

I.

PROCEEDINGS

On November 19, 1996, indictments were returned against Atkins charging that on August 17, 1996, Atkins abducted, robbed, and murdered Eric Michael Nesbitt in the commission of the robbery. Code §§ 18.2-48, -58, and -31(4). Atkins was also charged with use of a firearm while committing each of these offenses. Code § 18.2-53.1.[1]

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[1] Prior to trial, Atkins pled guilty to the abduction and robbery charges and their associated firearm crimes. He does

Atkins filed a pre-trial motion to have the Virginia capital murder and death penalty statutes declared unconstitutional. Along with this motion, Atkins filed an extensive brief containing multiple theories for his assertion that the substantive criminal law and procedural statutes governing capital crimes in Virginia are constitutionally deficient. The trial court, relying on conclusive statements of this Court supporting the constitutionality of these statutes, overruled this motion. The trial court also denied Atkins' motion for additional peremptory juror challenges.

In a motion in limine, Atkins sought to limit the introduction by the Commonwealth of DNA evidence related to blood samples found in Nesbitt's truck which indicated that Atkins and Nesbitt were the sources of that blood. Atkins asserted that this evidence was not sufficiently credible because William A. Jones was also an occupant of the truck and his blood had not been subjected to the DNA testing. In the alternative, Atkins sought to have a blood sample obtained from Jones and DNA tests performed thereon to establish whether Jones was a potential source for the blood found in the truck. The trial court received a proffer from the Commonwealth that there was no evidence that Jones had been wounded and, thus, that Jones was excluded as a possible source of the blood. On this ground, the trial court denied the motion.

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not challenge his convictions or sentences for these crimes in this appeal.

Jury selection began on February 9, 1998 and continued the next day. Starr D. Christian, a 19-year-old black female, was called from the venire and questioned by the trial court and counsel for the Commonwealth and Atkins. The trial court asked Christian if she or any member of her immediate family had "ever been the victim of a violent crime." Christian responded in the negative. Atkins' counsel subsequently asked Christian if she or any member of her immediate family had "ever been the victim of a crime, not just a violent crime, but a crime." Christian responded that her brother's car had been broken into on one occasion. Neither party challenged Christian for cause, and the trial court retained her in the venire for final jury selection. Thereafter, the Commonwealth used one of its four peremptory strikes to remove Christian from the jury. Code § 19.2-262. Atkins asserted that Christian had been struck based upon her race in violation of the ruling in *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Responding to Atkins' challenge, the Commonwealth initially asserted that it struck Christian because she was young and unmarried and, thus, would be less likely, in its view, to have empathy for the victim.[2] The Commonwealth further noted that it had acquired information

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[2] The Commonwealth also contended that Christian might lack empathy for the victim because she was not a parent, but subsequently conceded that Christian had not been questioned as to whether she had children or not. In addition, the Commonwealth conceded that it had discovered an offense report concerning an altercation between Christian and a relative that indicated that Christian possibly was a parent.

that, contrary to her testimony, Christian had been the victim of a grand larceny within the past year. The Commonwealth provided defense counsel with a copy of an offense report that listed Christian as the victim and complainant in the theft of a ring. Based upon this incident, the Commonwealth ultimately asserted Christian's lack of truthfulness as its race-neutral reason for removing her from the jury.

Atkins contended that a peremptory strike premised on the age of the prospective juror might also "run[ ] afoul of the *Batson* ruling." Atkins further contended that the Commonwealth gave "no indication nor were we told that there was a concern about [Christian's] truthfulness" at the time she was examined.

Noting its express concern over "the apparent oversight or flagrant incorrect answer to the Court's question and to counsel's question relative to victims of a crime," the trial court found that the Commonwealth had stated an adequate race-neutral reason for striking Christian from the jury. Accordingly, the trial court overruled Atkins' *Batson* challenge.

II.

EVIDENCE

A. Guilt Phase

We will review the evidence in the light most favorable to the Commonwealth. *Clagett v. Commonwealth*, 252 Va. 79, 84, 472 S.E.2d 263, 265 (1996), *cert. denied*, 519 U.S.

1122, 117 S.Ct. 972, 136 L.Ed.2d 856 (1997). On the afternoon of August 16, 1996, William A. Jones[3] and Atkins were "drinking and smoking weed" at the home Atkins shared with his father. During the course of that afternoon, "[a] couple of [Atkins'] friends came by, in and out." On several occasions during the afternoon and later that evening, those present pooled their money, and Atkins and Jones walked to a nearby convenience store to buy beer or were driven by one of Atkins' friends to an ABC store to buy liquor.

That evening between 10:30 and 11:00 p.m., a friend of Atkins, known to Jones only as "Mark," arrived at the home. Mark had brought a handgun with him and gave it to Atkins after Atkins said "that he wanted to use it, he would bring it back in the morning." A short time later, Atkins and Jones again walked to the convenience store to buy beer. Atkins told Jones that he did not have enough money and was going to "panhandle and get some change up." Atkins had the handgun he had borrowed from Mark tucked behind the waistband of his pants, partially concealed by his belt buckle.

While Jones waited, Atkins approached several people to ask for money and collected some from one or two. Nesbitt, who was a stranger to Atkins, arrived at the store in his truck at approximately 11:30 p.m. After a brief conversation with Atkins, Nesbitt went into the store.

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[3] Prior to Atkins' trial, Jones entered into a plea agreement with the Commonwealth dated September 5, 1997, in which Jones agreed to testify against Atkins in exchange for a reduction in the charges against him arising out of the murder of Nesbitt.

When Nesbitt returned to his truck and was preparing to leave the parking lot, Atkins "whistled" at him and Nesbitt stopped his truck.

Atkins went to the passenger's side of the truck and Jones went to the driver's side. Atkins then pointed the handgun at Nesbitt and ordered Nesbitt to "[m]ove over, let my friend drive." Jones entered the truck from the driver's side and Atkins entered from the passenger's side.

As Jones drove the truck away from the convenience store, Atkins demanded that Nesbitt surrender his wallet. Atkins removed $60 from the wallet and was returning it to Nesbitt when he noticed a bankcard inside the wallet. On Atkins' instruction, Jones drove to a branch of Crestar Bank where Atkins forced Nesbitt to withdraw $200 using the bankcard from the bank's drive- through automatic teller machine. The security camera in this automatic teller machine recorded the truck arriving at the bank shortly after midnight on August 17, 1996. The videotape produced by the camera showed that Jones was driving, Atkins was in the passenger seat, and Nesbitt was between them. Nesbitt had to lean across Jones in order to operate the machine. During this entire time, Atkins kept the handgun pointed at Nesbitt.

Jones then drove to the parking lot of a nearby school where he and Atkins discussed what they should do with Nesbitt. Jones urged Atkins to "just tie him up so we can get away." Atkins told Jones he knew of a place near his grandfather's house in Yorktown where they could leave Nesbitt and directed Jones to drive toward Yorktown on

Interstate 64. Nesbitt asked them "just don't hurt me" and made no attempt to escape.

Upon arriving in a secluded area of York County off the Lee Hall exit of Interstate 64, Atkins exited the truck and ordered Nesbitt to do the same. "Nesbitt stepped out of the vehicle and probably took two steps" when Atkins began shooting him. Jones attempted to exit the truck because he feared that some of the shots were "coming in the truck." Unable to open the driver's side door, Jones rolled down the driver's side window and "jumped" out of the truck.

Jones began to struggle with Atkins for the handgun and Atkins was shot in the leg during that struggle. After Jones obtained the handgun, he drove Atkins to the emergency room of a local hospital, leaving Nesbitt's dead body at the scene of the shooting. Outside the emergency room, Jones asked Atkins for some of the money that had been taken from Nesbitt and then drove away alone in Nesbitt's truck.

After leaving Atkins at the emergency room, Jones drove to a motel in Newport News where he abandoned Nesbitt's truck. Jones spent the next several days moving from motel to motel. He cut his hair in an attempt to disguise his appearance. Jones subsequently returned to the first motel, where police, who previously had discovered the abandoned truck at the motel and were maintaining a surveillance of the area, arrested him. The handgun was not found in the truck and was never recovered.

Garland S. Clay discovered Nesbitt's body at the crime scene sometime after 3:45 a.m. on August 17, 1996

and contacted police. Investigator Frederick T. Lyons, a member of the major crimes section of the York County Sheriff's Office, arrived at the crime scene at 5:15 a.m.

Lyons discovered six shell casings near Nesbitt's body. After determining that Nesbitt had an account at Crestar Bank, Lyons learned that two withdrawals from the account had been made at Crestar automatic teller machines the previous night, one for $60 and one for $200. Lyons obtained still photographs and the videotapes from the automatic teller machines' security cameras and distributed copies to local police and media.

After the media broadcast the photographs, several callers to a "crime line phone number" identified Jones as the driver of Nesbitt's truck. One caller told police that "a person that Mr. Jones runs with was a Daryl Atkins." Based upon these identifications, Lyons obtained an arrest warrant for Jones. After interviewing Jones' father and the father's girlfriend, Lyons "learned that Mr. Atkins was with William Jones," and obtained Atkins' address. Finding Atkins at home, Lyons was able to identify Atkins from the security camera photographs and placed him under arrest.

Dr. Leah L.E. Bush, an Assistant Chief Medical Examiner for the Commonwealth, performed an autopsy on Nesbitt's body. This autopsy revealed that Nesbitt had sustained eight separate gunshot wounds to the thorax, chest, abdomen, arms and legs. Several of the bullets exited and reentered the body. Three of the gunshot wounds were lethal. However, Nesbitt could have lived for several minutes before "the bleeding was to the point

where his blood pressure would not support consciousness and life." Three bullets were recovered during the autopsy.

Additional forensic evidence showed that the six shell casings recovered from the crime scene had all been fired from the same weapon, as were the three bullets recovered from Nesbitt's body, a bullet recovered from Nesbitt's truck, and a bullet recovered from Atkins' leg. Bloodstains found on the passenger seat and interior passenger side door of Nesbitt's truck were identified as consistent with either Nesbitt's or Atkins' blood types. None of the tested samples was identified as likely to have come from another source.

Subsequent to his arrest and prior to his trial, while an inmate in the York County jail, Atkins shared a cell with Stephen R. Burton. According to Burton, Atkins told him "[t]hat he had put a boy out of a truck in York County, that he had shot at a boy to scare him." Atkins told Burton that he was not worried about being convicted because the police "wouldn't find the weapon . . . they didn't have the weapon, the only thing they had on him was a picture holding a gun to a boy" at the automatic teller machine. Atkins also told Burton that he had shot himself in the leg, but that he could not remember it because he was "too messed up" on drugs and alcohol to realize it.

Atkins testified on his own behalf and was the only defense witness on the issue of guilt. Atkins' account of the robbery and murder was in direct conflict with that of Jones. According to Atkins, he and Jones had gone to the convenience store with the intent to rob someone, and it

was Jones who was armed and who initiated the contact with Nesbitt. Atkins maintained that Jones forced his way into Nesbitt's truck, and then gave the handgun to Atkins so that Jones could drive. Atkins admitted taking money from Nesbitt's wallet and forcing Nesbitt to withdraw money from the automatic teller machine.

Atkins further maintained that Jones said "he know [(sic)] a place and he never told me" where they could take Nesbitt and "tie him up." After leaving the interstate, according to Atkins, Jones stopped the truck, took the handgun back from Atkins, placed it in a holster on his belt, and directed Atkins and Nesbitt to change places so that Nesbitt was sitting by the passenger door. Jones then drove "a little more" and then exited the truck and ordered Nesbitt to get out of the truck as well. With regard to the critical issue of who was the "triggerman" in the murder of Nesbitt, Atkins maintained that Jones shot Nesbitt several times and that one of the shots struck Atkins in the leg.

The jury was instructed and heard closing arguments from counsel. After its deliberations, the jury returned verdicts convicting Atkins of capital murder and the associated firearm crime.

B. Penalty Phase

The Commonwealth sought the imposition of the death penalty based on the aggravating factors of future dangerousness and vileness. Code § 19.2- 264.2. During the penalty phase, to prove future dangerousness, the

Commonwealth presented evidence of Atkins' prior felony convictions, which included robbing and maiming, the testimony of several victims of prior robberies and assaults committed by Atkins, and victim impact testimony from Nesbitt's mother. After concluding the presentation of this evidence, the Commonwealth rested, and Atkins made a motion to strike the Commonwealth's evidence as to the aggravating factor of vileness on the ground that no evidence presented in the penalty phase would support such a finding. Code § 19.2-264.4(C). Over Atkins' objection, the trial court permitted the Commonwealth to reopen its case in order to have the exhibits introduced during the guilt phase included in the evidence to be considered in the penalty phase. Those exhibits included pictures of Nesbitt's body, the autopsy report, and other items.

Atkins presented the testimony of Dr. Evan Stuart Nelson, a forensic psychologist. Dr. Nelson testified that Atkins' full scale IQ is 59 with a verbal IQ of 64 and a performance IQ of 60.[4] Based on these scores, Dr. Nelson stated that Atkins "falls in the range of being mildly mentally retarded." Dr. Nelson concluded that, based on Atkins' prior behavior while incarcerated, there was a "very high likelihood" that Atkins would not be "violent within the prison" if given a life sentence.

On cross-examination, Dr. Nelson conceded that he "did not find a reason to raise a concern to the Court or

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[4] Dr. Nelson explained that "the full scale IQ score is not a simple mathematical average between 64 and 60. It's actually putting all of the items back together, charting out a graph of the scores and then figuring out where people stand."

counsel about [Atkins'] competency" to stand trial. In addition, Dr. Nelson concluded from the data available to him that "there were no indications that [Atkins] could not appreciate the nature of his behaviors and control himself."

After all the evidence relating to the penalty phase had been received, the trial court and counsel considered jury instructions and the verdict form. The trial court granted the Commonwealth's first instruction which properly detailed the necessity of the jury finding that either one or both of the statutory aggravating factors of future dangerousness and vileness were proven beyond a reasonable doubt before it could impose the death penalty. It further provided that the jury could nonetheless impose a sentence of imprisonment for life or a sentence of imprisonment for life and a fine if "the death penalty is not justified." Finally, this instruction properly directed the jury that if the Commonwealth failed to prove beyond a reasonable doubt at least one of the aggravating factors of future dangerousness or vileness, then it was required to impose a sentence of imprisonment for life or a sentence of imprisonment for life and a fine.

The Commonwealth's second instruction defined "imprisonment for life" to mean "life without possibility of parole." The Commonwealth's third instruction detailed the possible sentences for the firearm crime. The trial court granted both of these instructions.

The Commonwealth proffered an instruction on mitigating circumstances. Atkins' counsel expressly stated that he did not want the trial court to give this instruction, and the Commonwealth withdrew it. Atkins did not

proffer an alternative instruction on mitigating circumstances and raised no objection to the absence of an express instruction on mitigation.

During the discussion of the instructions, several references were made to the proposed jury verdict forms. At that time, the Commonwealth advised the trial court that it was in the process of redrafting its proposed verdict form because "there was a revision that [Atkins' counsel] wanted [the Commonwealth] to make" in that verdict form. Atkins' counsel responded, "[U]nless [the Commonwealth has] done a major redraft, I prefer mine which gives the jury every option. [The Commonwealth's], from what I saw, was . . . limited to death." The trial court then stated, "Well, they obviously have the option of life."

A short time later, the Commonwealth's redrafted verdict form was given to the trial court and Atkins' counsel. Referring to this form, the Commonwealth stated, "Ours are the same as the Defense's, Judge. They are both Model Instructions."

Atkins' proposed verdict form contained seven alternative findings. The first six of these, in order, permitted the jury to impose either a sentence of death or one of imprisonment for life and a fine if it found that both aggravating factors were proven, if it found future dangerousness alone was proven, or if it found vileness alone was proven. The seventh finding on Atkins' form permitted the jury to impose only a sentence of life imprisonment and a fine if neither aggravating factor was found to have been proven beyond a reasonable doubt.

The Commonwealth's proposed verdict form contained six alternative findings corresponding, although in a different order, with the first six alternative findings on Atkins' proposed form. It did not provide a finding permitting the jury to impose only a life sentence and fine if neither aggravating factor was found to have been proven beyond a reasonable doubt.

After the instructions were agreed upon, the trial court reviewed the two sets of proposed verdict forms and stated, "Either is okay with the Court. I think they both say the same thing, identically the same thing." Atkins' counsel responded, "Pretty close the same thing." The Commonwealth then stated that the findings in its form were merely listed in a different order from that of the defense's form. The Commonwealth asserted that the order of its form, giving options for death and life imprisonment verdicts based on the individual aggravating factors and then the option for a verdict premised on both factors being present was more appropriate. The trial court accepted the Commonwealth's proposed verdict form. Atkins did not object to the content of the Commonwealth's verdict form at the time it was adopted by the trial court or when it was subsequently read to the jury.

In closing argument, Atkins' counsel made brief references to Atkins' low intelligence, and urged the jury to impose a sentence of life without possibility of parole rather than a death sentence. Counsel argued that a life sentence would be appropriate, based on Dr. Nelson's opinion that Atkins would be able to exercise some level of self-control within the structured environment of prison.

The jury found that Atkins both represented a future danger to society and that the murder of Nesbitt had been outrageously or wantonly vile. Based upon its finding of these aggravating factors, the jury returned a verdict imposing a sentence of death on Atkins for the murder of Nesbitt.

C. *Sentencing Hearing*

At sentencing, Atkins' counsel objected for the first time to the failure of the verdict form to include a finding permitting the jury to impose only a life sentence and fine if it found that neither aggravating factor was proven beyond a reasonable doubt. Counsel made a motion to set aside the jury's verdict imposing the death penalty. The trial court ruled that the objection was not timely, and further noted that the evidence was adequate to support the jury's findings of future dangerousness and vileness, precluding the possibility of it imposing the mandatory sentence of life imprisonment in the absence of such factors. The trial court then confirmed the jury's verdict and sentenced Atkins to death. This appeal followed.

III.

DISCUSSION

We begin by noting that Atkins has modified the order and phrasing of his assignments of error in his opening brief from those originally designated by him under Rule 5:22(b). In our discussion, we shall refer only to the 19 original assignments of error as listed by Atkins

in the Rule 5:22(b) designation.[5] *Sheppard v. Commonwealth*, 250 Va. 379, 385-86, 464 S.E.2d 131, 135 (1995), *cert. denied*, 517 U.S. 1110, 116 S.Ct. 1332, 134 L.Ed.2d 483 (1996). Atkins has not briefed or argued assignments of error 9, 13, and 20 and, thus, we will not consider them. *Id.* at 386, 464 S.E.2d at 135.

A. Issues Previously Decided

In assignments of error 3, 4, 5, 6, 7, and 8, Atkins raises various challenges to the constitutionality of the Virginia capital murder statute and the statutory scheme under which capital murder trials are conducted and death sentences are reviewed on appeal. In addition, in assignment of error 12, Atkins asserts the general proposition that "the Virginia Death Penalty Statutes Violate the Virginia and United States Constitutions." On brief, Atkins does not make a particularized argument relevant to assignment of error 12, but simply identifies it as being subsumed within the argument of his other constitutional challenges. The arguments raised in these assignments of error, which in several instances are overlapping, have been thoroughly addressed and rejected in numerous prior capital murder cases.[6] We find no reason to modify our previously expressed views on these issues.

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[5] In the Rule 5:22(b) designation, the assignments of error are numbered from 1 to 20, but there is no assignment of error numbered 18.

[6] *See, e.g., Barnabei v. Commonwealth*, 252 Va. 161, 178-79, 477 S.E.2d 270, 280 (1996), *cert. denied*, 520 U.S. 1224, 117 S.Ct. 1724, 137 L.Ed.2d 845 (1997) (aggravating factors of future dangerousness and vileness are not unconstitutionally vague); *Joseph v. Commonwealth*, 249 Va. 78, 82, 452 S.E.2d 862, 865, *cert. denied*, 516 U.S. 876, 116 S.Ct. 204, 133 L.Ed.2d 137 (1995) (death penalty does not constitute cruel and unusual punishment; appellate review process does not deprive defendant of statutory rights and due process of law); *Breard v. Commonwealth*, 248 Va. 68, 74, 445 S.E.2d 670, 675, *cert. denied*, 513 U.S. 971, 115 S.Ct. 442, 130 L.Ed.2d 353 (1994) (method of instructing jury on mitigation does not impermissibly interfere with jury's consideration of evidence offered in mitigation); *Stewart v. Commonwealth*, 245 Va. 222, 229, 427 S.E.2d 394, 400, *cert. denied*, 510 U.S. 848, 114 S.Ct. 143, 126 L.Ed.2d 105 (1993) (proof of future dangerousness by prior criminal convictions does not violate double jeopardy); *Smith v. Commonwealth*, 219 Va. 455, 476- 77, 248 S.E.2d 135, 148 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979) ("vileness" and "dangerousness" predicates for imposition of the death penalty do not impermissibly fail to guide the jury's discretion).

Atkins further assigns error to the trial court's failure to grant him additional peremptory strikes during jury selection. *See* Code § 19.2-262. We have repeatedly held that there is no right to additional peremptory challenges in a capital murder trial. *See, e.g., Strickler v. Commonwealth*, 241 Va. 482, 489, 404 S.E.2d 227, 232, *cert. denied*, 502 U.S. 944, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991).

B. Request for Blood Sample

Atkins assigns error to the trial court's denial of his motion in limine to have a blood sample taken from Jones or in the alternative limiting the Commonwealth's presentation of the results of DNA testing of the blood found at the scene of the murder. Atkins contends that in doing so, the trial court interfered with his "right to call evidence in his favor." We disagree.

In arguing his motion, Atkins conceded that there was no evidence to suggest that Jones was a potential source of any of the blood evidence recovered from the crime scene. The evidence at trial showed that each of the blood samples could almost certainly be linked to either Nesbitt or Atkins. Therefore, Atkins' request that a sample of Jones' blood be taken for DNA comparison to the blood found at the crime scene was not founded on any reasonable claim that it was necessary to his defense. *See O'Dell v. Commonwealth*, 234 Va. 672, 686, 364 S.E.2d 491, 499, *cert. denied*, 488 U.S. 871, 109 S.Ct. 186, 102 L.Ed.2d 154 (1988). Moreover, Atkins cannot demonstrate that the failure to make that evidence available to him was materially prejudicial to the presentation of his theory of the case. *See Satcher v. Commonwealth*, 244 Va. 220, 244-45, 421 S.E.2d 821, 836 (1992), *cert. denied*, 507 U.S. 933, 113 S.Ct. 1319, 122 L.Ed.2d 705 (1993).

C. *Batson Challenge*

Atkins contends that the trial court erred in overruling his *Batson* challenge to the Commonwealth's peremptory strike of Christian. While making only a cursory argument on this issue on brief, during oral argument of this appeal Atkins' counsel asserted that the Commonwealth's proffer of the offense report was insufficient to establish that Christian had actually been the victim of a crime and, thus, that it would not support the Commonwealth's contention that Christian had failed to answer the trial court's and counsel's questions truthfully.

In *Batson*, the United States Supreme Court held that purposeful discrimination based on race in selecting

jurors violates the Equal Protection Clause. *Batson*, 476 U.S. at 89, 106 S.Ct. 1712. If an accused makes a *prima facie* showing of the prosecution's use of peremptory strikes on the basis of race, the burden shifts to the prosecution to articulate race-neutral reasons for such strikes. *Chichester v. Commonwealth*, 248 Va. 311, 323, 448 S.E.2d 638, 646 (1994), *cert. denied*, 513 U.S. 1166, 115 S.Ct. 1134, 130 L.Ed.2d 1095 (1995). On appeal, we will assume, without deciding, that Atkins made a *prima facie* showing of a discriminatory strike. Thus, we consider whether the trial court abused its discretion in accepting the Commonwealth's articulated race-neutral reason for striking the prospective juror. A trial court's determination whether the reason given is race-neutral is entitled to great deference, *Spencer v. Commonwealth*, 238 Va. 295, 310, 384 S.E.2d 785, 795 (1989), *cert. denied*, 493 U.S. 1093, 110 S.Ct. 1171, 107 L.Ed.2d 1073 (1990), and will not be reversed on appeal unless it is "clearly erroneous." *Hernandez v. New York*, 500 U.S. 352, 369, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

There is no merit to Atkins' contention on this issue. The trial court was not required to determine whether the criminal complaint filed by Christian would ultimately prove sufficient to establish that she had actually been the victim of a crime. Nor was the Commonwealth required to show that Christian could have been struck for cause. Rather, the Commonwealth's burden was to show that it had a sufficient race-neutral reason for using one of its peremptory strikes in removing Christian from the jury. At the time the Commonwealth exercised this peremptory strike, it had a sufficient subjective basis for questioning Christian's truthfulness. The trial court

accepted the Commonwealth's stated basis for its action, and that decision is clearly supported by the record.

D. Admission of Atkins' Statement to Police

On August 21, 1996, Atkins voluntarily gave a statement to Investigator Lyons in which Atkins admitted his participation in the abduction, robbery, and murder of Nesbitt. In that statement, however, Atkins denied that he had been the "triggerman" and asserted that Jones alone had shot Nesbitt. At trial, during cross-examination of Lyons, Atkins' counsel attempted to elicit testimony from Lyons that Atkins' statement contained this denial and assertion. The Commonwealth objected on the ground that, while the statement inculpated Atkins as a participant in these crimes, Atkins' denial that he was the "triggerman" was self-serving and inadmissible hearsay. The trial court ultimately sustained that objection and cautioned the jury to disregard any reference to this statement.

Subsequently during his testimony, Atkins was permitted to reference the content of this statement in great detail. Significantly, Atkins testified that in his prior statement he "told them that William Jones pulled the trigger." Consistent with that assertion, Atkins further testified that he did not "shoot a gun" on the night of the murder and that Jones had shot Nesbitt.

On brief, Atkins asserts only that "Mr. Atkins' statement to the [police] should have been admitted as an exception to the hearsay rule under the statement against penal interest exception." This assertion simply ignores

the fact that the statement was ultimately admitted in conjunction with Atkins' testimony, and that the jury clearly had the benefit of Atkins' prior consistent assertion to bolster his trial testimony that he was not the triggerman. Thus, no prejudice resulted to Atkins. Moreover, there is no merit to Atkins' assertion that his prior statement should have been admitted during Lyons' testimony.

At the time of Lyons' testimony, Atkins had not testified and the limited circumstances in which a prior consistent statement is admissible were not applicable. *See Manetta v. Commonwealth*, 231 Va. 123, 128 n. 3, 340 S.E.2d 828, 831, n. 3 (1986). Atkins' prior consistent statement on the triggerman issue provided no basis to impeach the testimony of Lyons because Lyons was not the declarant or otherwise bound by the statement. Nor could the statement have been admitted as being against penal interest, since Atkins, the declarant, was not "unavailable" to testify at trial, which is a prerequisite to invoke that exception to the hearsay rule. *Ellison v. Commonwealth*, 219 Va. 404, 408, 247 S.E.2d 685, 688 (1978)

E. Sufficiency of the Evidence

Atkins contends that the trial court erred in failing to set aside the jury's verdict convicting him of capital murder because the evidence failed to establish beyond a reasonable doubt that he was the triggerman in the killing of Nesbitt. On brief, Atkins candidly states that "[t]his case comes down to the testimony of Mr. William A. Jones and Stephen R. Burton against the testimony of Mr. Atkins." During oral argument of this appeal, Atkins'

counsel conceded that, to find error in the trial court's action, this Court would be required to reweigh the evidence and make determinations as to the credibility of the witnesses and their testimony.

"[T]he credibility of witnesses and the weight to be accorded their testimony are questions for the fact finder." *Saunders v. Commonwealth*, 242 Va. 107, 113, 406 S.E.2d 39, 42, *cert. denied*, 502 U.S. 944, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991). Where the jury has seen and heard the witnesses and assessed their credibility and the weight of their testimony, its determination of the facts will not be overturned on appeal unless it is plainly wrong or without evidence to support it. Code § 8.01-680.

Thus, while Atkins may selectively craft an interpretation of the evidence to fit his claims of innocence, and attack the credibility and motivation of Jones and Burton, the trial court, and this Court on appeal, may not substitute its own judgment for that of the jury where a reasonable interpretation of the evidence supports the verdict. Here, the evidence when viewed in its entirety supports the jury's determination that, beyond a reasonable doubt, Atkins was directly responsible for Nesbitt's death and that Atkins was the triggerman. Accordingly, the trial court did not err in refusing to set aside the conviction for capital murder.

F. The Verdict Form[7]

Atkins asserts that the jury was not properly "instructed" during the penalty phase because the verdict form failed to provide the jury with the option of sentencing Atkins to life imprisonment upon a finding that neither of the aggravating factors of future dangerousness or vileness was proven beyond a reasonable doubt. We agree.

It is a well established rule that under normal circumstances a trial court is under no obligation to amend or correct an instruction that contains a misstatement of law. However, "when the principle of law is materially vital to [the] defendant in a criminal case, it is reversible

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[7] This issue was raised in assignment of error 19, which asserts errors in the instruction of the jury in both the guilt phase with respect to accomplice testimony, and in the penalty phase on the issue discussed herein. During oral argument of this appeal, Atkins' counsel conceded that he had not proffered an instruction on accomplice testimony at the conclusion of the guilt phase or objected to the trial court's failure to give such an instruction *sua sponte* and, thus, that the issue was not properly preserved for appeal. Rule 5:25.

In addition, the Commonwealth asserts on brief that assignment of error 19 is inadequate to encompass a challenge to the verdict form because a verdict form is not an "instruction" to the jury, but is merely a tool to aid the jury in rendering its verdict. However, during discussion of this issue at trial, the trial court, the Commonwealth, and Atkins' counsel used the terms "verdict form," "finding form," and "finding instructions" interchangeably. Moreover, in this context, the term "instruction" is sufficiently broad to cover any statement of the law given by the trial court to the jury, which would necessarily include the written verdict form required by Code § 19.2-264.4(D).

error for the trial court to refuse a defective instruction instead of correcting it and giving it in the proper form." *Whaley v. Commonwealth*, 214 Va. 353, 355-56, 200 S.E.2d 556, 558 (1973); *accord Bryant v. Commonwealth*, 216 Va. 390, 392-93, 219 S.E.2d 669, 671-72 (1975). Clearly, it is materially vital to the defendant in a criminal case that the jury have a proper verdict form. Moreover, Atkins submitted a proper verdict form, as required by Code § 19.2-264.4(D) and, thus, there can be no question that the trial court, while having the discretion to elect between the two forms proffered to it, had the duty to give the jury a proper verdict form. It was the Commonwealth's verdict form that was erroneous and, thus, when the trial court accepted the Commonwealth's assertion that the order of sentencing options in its form was preferable, it was the Commonwealth, and not Atkins, that placed the trial court in the position of erring when it failed to correct the omission in the Commonwealth's form.[8]

In the present case, the Commonwealth represented to both the trial court and Atkins' counsel that its proposed verdict form was "the same as the Defense's" except that the alternative findings varied in order. This

[8] We note further that, while not raising a precise objection to the Commonwealth's proposed verdict form at the time it was selected by the trial court, Atkins' counsel consistently stated his preference for the form he had submitted to the trial court. *Cf. Pilot Life Insurance Co. v. Karcher*, 217 Va. 497, 498, 229 S.E.2d 884, 885 (1976) (where a party proffers an alternative instruction that is a correct statement of the law, this, without more, will be adequate to preserve for appeal a challenge to the instruction actually given).

simply was not accurate. The Commonwealth's form contained no alternative finding permitting the jury to impose only a life sentence if neither future dangerousness nor vileness had been proven beyond a reasonable doubt. Thus, each of the Commonwealth's alternative verdicts required the jury to find at least one of the aggravating factors to have been present before imposing a sentence of either death or life imprisonment. Although neither the trial court nor Atkins' counsel noted the discrepancy between the Commonwealth's proposed verdict form and Atkins' form, Atkins' counsel was entitled to rely upon the Commonwealth's representation that there was no discrepancy between the forms and it had merely varied the order of the findings from that in Atkins' form.

The trial court's use of the Commonwealth's form resulted in the jury receiving a verdict form which was incomplete and which did not comport with the correct statement of law given to the jury by the trial court in its first instruction. We need go no further in our analysis to determine whether the jury in fact was left with the impression, contrary to the trial court's instruction, that it was required first to find that at least one of the aggravating factors was present. The jury was presented with a confusing situation in which the trial court's instructions and the form the jury was given to use in discharging its obligations were in conflict.

For these reasons, we will set aside the sentence of death imposed by the jury and remand the case to the trial court for a new penalty proceeding.

G. Reopening of Commonwealth's Case in the Penalty Phase

Asserting that the Commonwealth failed to introduce any evidence of vileness prior to resting its case during the penalty phase, Atkins contends that the trial court erred in failing to strike the Commonwealth's evidence as to that aggravating factor and instead permitting the Commonwealth to reopen its case in order to reintroduce the exhibits used in the guilt phase to establish the vileness of the crime. Because of the ultimate disposition we make in this appeal, this issue is moot. We note, however, that because Code § 19.2-264.4(B) requires that the sentencing jury consider "the circumstances surrounding the offense" in determining punishment, the Commonwealth will be permitted to reintroduce such evidence on remand as is relevant to prove the existence of either aggravating factor.

H. Statutory Review of Death Penalty

Because we have determined that there was reversible error in the penalty phase of Atkins' trial which will necessitate a remand to the trial court, we need not consider at this time "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor" and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Code § 17.1-313.[9]

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[9] Title 17.1 superseded former Title 17 effective October 1, 1998 and prior to the argument of this appeal. The current statute, Code § 17.1-313, provides for review by this Court in the same manner as the now superseded provisions of Code § 17-110.1, the statute under which the parties briefed the appeal.

IV.

CONCLUSION

For the reasons stated, we find no reversible error in the guilt phase of Atkins' trial, and, accordingly, we will affirm Atkins' conviction for capital murder. Because there was error in the penalty phase of the trial with respect to the imposition of the death penalty, we will reverse the sentence of death and remand the case to the trial court for a new penalty proceeding on the capital murder conviction.

Affirmed in part, reversed in part, and remanded.

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

DARYL RENARD ATKINS,
Defendant

V. **RECORD NO. 000395**

COMMONWEALTH OF VIRGINIA

APPELLANT'S ASSIGNMENTS OF ERROR AND DESIGNATION OF THE RECORD

Pursuant to Rule 5:22 of the Supreme Court of Virginia, Daryl Renard Atkins, by Counsel, makes the following assignments of error and designation of the record:

ASSIGNMENTS OF ERROR

1]. The sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factor.

2]. The sentence of death is excessive or disproportionate to the penalty imposed in similar cases.

3]. Virginia's bifurcated jury system as applied in capital re-sentencings by limiting the information the sentencing jury has when determining whether, or not, to impose a death penalty and by limiting the ability of the defendant to respond to the evidence and argument of the Commonwealth, violates the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Sections 8 and 9 of the Virginia Constitution, both generally and applied in this case. [Transcript of 8/17/99 pages 35 through 39; page 20; Transcript of 8/19/99 page 136].

4]. The Court erred in overruling the Mr. Atkins challenge to the Commonwealth's peremptory strike of venireman, Stuart Hedgepeth, Sr. pursuant to *Batson v. Kentucky* [Transcript of 8/18/99 pages 20-21].

5]. The Court erred in denying Mr. Atkins' Motion to Strike [Transcript of 8/18/99 pages 169-170 and pages 316-317; Transcript of 8/19/99 page 136].

6]. The Court erred in limiting Mr. Atkins' examination of Investigator F. T. Lyons thereby limiting the evidence in mitigation Mr. Atkins was able to present [Transcript of 8/18/99 pages 173-184].

7]. The Court erred in failing to properly instruct the jury [Transcript of 8/19/99 pages 77 through 80 and pages 83 through 86].

8]. The Court erred in denying Mr. Atkins' motion to strike the entire panel of veniremen in violation of his rights under the 6th, 8th and 14th Amendments to the United States Constitution and Article I, Sections 8 and 9 of the Virginia Constitution [Transcript of 8/17/99 pages 34-35; and pages 141-142].

DESIGNATION OF THE RECORD

1]. Order of the Supreme Court of Virginia remanding for a new sentence.

2]. Indictment CR96-8229-01;

3]. All exhibits introduced by both the Commonwealth and the defendant.

4]. Transcript of hearing of 8/17/99: pages 10-11; pages 163 through 178; pages 34 through 39; pages 141-142 and pages 197 through 202.

6]. Transcript of hearing of 8/18/99: pages 21-21; pages 39 through 345.

7]. Transcript of hearing of 8/19/99: pages 5 through 50; pages 77 through 80; pages 83 through 86 and page 136.

8]. Instructions offered by Mr. Atkins which were denied by the Court.

9]. All jury instructions.

10]. Sentencing Order of 11/22/99.

11]. Notice of Appeal.

RESPECTFULLY SUBMITTED

DARYL RENARD ATKINS

by: Bryan L. Saunders
OF COUNSEL

CERTIFICATE

I hereby certify that a true copy of the above Assignments of Error and Designation of the Record was delivered to Mark L. Early, Attorney General Of Virginia, 900 East Main Street, Richmond, Virginia 23219, this 6th March, 2000.

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(Cite as: 534 S.E.2d 312)

Supreme Court of Virginia.

Daryl Renard ATKINS

v.

COMMONWEALTH of Virginia.

Record No. 000395.

Sept. 15, 2000.

Bryan L. Saunders, Newport News; George M. Rogers, III, Washington, DC, for appellant.

Pamela A. Rumpz, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for appellee.

Present: All the Justices.

KINSER, Justice.

Daryl Renard Atkins was convicted in the Circuit Court of York County of the 1996 capital murder of Eric Michael Nesbitt and sentenced to death. On appeal, we affirmed his conviction, *Atkins v. Commonwealth*, 257 Va. 160, 180, 510 S.E.2d 445, 457 (1999), but remanded the case to the circuit court for a new penalty proceeding due to an improper jury sentencing verdict form, *id.* at 177-79, 510 S.E.2d at 456-57.[1] At resentencing, a different jury found that there is a probability that Atkins would commit acts of violence in the future that would constitute a continuing serious threat to society, and that his conduct

[1] Atkins was also convicted of abduction, robbery, and use of a firearm while committing those offenses. In his first appeal, he did not challenge these convictions. *Atkins*, 257 Va. at 163 n. 1, 510 S.E.2d at 447 n. 1.

in committing the capital murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." The jury fixed Atkins' punishment at death. At a separate sentencing hearing, the circuit court imposed the death penalty in accordance with the jury verdict. Atkins now appeals that sentence.

Atkins assigns eight errors on appeal. After considering those issues and conducting our mandated review pursuant to Code § 17.1-313(C), we find no error in the judgment of the circuit court and will affirm the imposition of the death penalty.[2]

I. ISSUES REGARDING MITIGATION

In three related assignments of error, Atkins raises the question whether the circuit court improperly inhibited the jury's consideration of mitigating evidence. First, he asserts that Virginia's bifurcated jury system, as applied when a case is remanded for a new sentencing hearing before a different jury, unconstitutionally limits a defendant's ability to present relevant evidence from the guilt phase of the previous trial. Second, Atkins claims that the circuit court erred in limiting his examination of Frederick T. Lyons, an investigator with the York County sheriff's office, thereby denying Atkins the opportunity

[2] We recited the evidence in the record in our prior decision, *Atkins*, 257 Va. at 165-69, 510 S.E.2d at 449-51. We need not repeat that evidence here, except to the extent necessary as part of our analysis of Atkins' assignments of error in this appeal.

to present a complete defense, including mitigating evidence, at his new sentencing hearing. Finally, Atkins argues that the circuit court erred in refusing to instruct the jury about mitigating factors. We find no merit to these claims.

Initially, to the extent that Atkins contends that Virginia's bifurcated jury system is constitutionally defective because he could not, at his resentencing, present evidence and argue "residual doubt" with regard to his guilt in the commission of the crime, that contention has been previously addressed and rejected by this Court.[3] *See Stockton v. Commonwealth*, 241 Va. 192, 210-11, 402 S.E.2d 196, 206-07, *cert. denied*, 502 U.S. 902, 112 S.Ct. 280, 116 L.Ed.2d 231 (1991) (defendant not allowed to introduce evidence and argue "residual doubt" at new sentencing hearing); *Frye v. Commonwealth*, 231 Va. 370, 393, 345 S.E.2d 267, 283 (1986) (defendant cannot contest correctness of guilty verdict at sentencing phase); *see also Franklin v. Lynaugh*, 487 U.S. 164, 173, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (defendant is not entitled to jury instruction on "residual doubt"). We find no reason to depart from our precedent.[4]

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[3] In addition, the Commonwealth filed a motion in limine to prohibit Atkins from presenting evidence or argument with regard to any factual issue concerning his guilt. The circuit court granted the motion, and ordered Atkins and his counsel "to refrain from any attempt, during the resentencing proceeding, to inquire into, comment upon or argue any factual issue relative to [Atkins'] guilt." Atkins has not assigned error to the circuit court's order granting the motion in limine. *See* Rule 5:17.

[4] That precedent does not mean that a defendant can never present evidence from the guilt phase of a trial at a subsequent resentencing hearing. Depending on the facts of each case, certain guilt-phase evidence may also be relevant to issues at resentencing, especially if the vileness predicate is at issue. Even when such evidence is relevant, a defendant still cannot argue or present evidence concerning "residual doubt." *Stockton*, 241 Va. at 210-11, 402 S.E.2d at 206-07.

However, Atkins contends that the evidence he sought to introduce through the testimony of Lyons was not offered for the purpose of creating "residual doubt" about his guilt. Specifically, during direct examination, Atkins' counsel asked Lyons, "[A]fter you advised [Atkins] of [his Miranda] rights, did [Atkins] confess to you his involvement in the murder of Eric Nesbitt?" According to Atkins, the information that he sought to elicit by that question was the fact that he had admitted his participation in the murder of Nesbitt. Atkins argues that such information was relevant to the issues of Atkins' remorse and his cooperation with law enforcement authorities, both of which are proper subjects of mitigating evidence.

The Commonwealth objected to the question, contending that it called for a hearsay statement. The Commonwealth also noted that, while Atkins confessed to Lyons his involvement in the abduction, robbery, and murder of Nesbitt, Atkins denied that he was guilty of capital murder. In the confession to Lyons, Atkins maintained that his accomplice alone was the "triggerman." Thus, according to the Commonwealth, for Lyons to appropriately answer the propounded question, he would have to tell the jury that Atkins denied that he pulled the trigger, which would have been contrary to the circuit court's prior ruling that evidence regarding

Atkins' guilt would not be admitted at the resentencing hearing.

The circuit court sustained the Commonwealth's objection on the basis that the testimony being elicited from Lyons was hearsay.[5] We agree.

In Atkins' initial appeal to this Court, we considered this same evidence and held that no exception to the hearsay rule applied which would allow Lyons to testify about the content of Atkins' statement to him. *Atkins*, 257 Va. at 176, 510 S.E.2d at 455. The proffer of this evidence at the resentencing hearing does not change the hearsay analysis. According to Code § 19.2-264.4(B), mitigating evidence relevant to sentencing is "subject to the rules of evidence governing admissibility." *See Cherrix v. Commonwealth*, 257 Va. 292, 309, 513 S.E.2d 642, 653, *cert. denied*, 528 U.S. 873, 120 S.Ct. 177, 145 L.Ed.2d 149 (1999) (subject to rules of evidence governing admissibility, trial court has discretion under Code § 19.2-264.4(B) to determine what evidence may be adduced in mitigation of offense); *Coppola v. Commonwealth*, 220 Va. 243, 253, 257 S.E.2d 797, 804 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62

[5] Atkins' counsel proffered to the court that Lyons would also testify that Atkins admitted his involvement in certain crimes committed in the City of Hampton. The orders showing Atkins' convictions for those crimes had already been introduced into evidence and, as noted by the Commonwealth, reflected whether Atkins had pled guilty to those crimes. The circuit court sustained the Commonwealth's objection to this additional evidence also on the basis that it was hearsay. After the court sustained the Commonwealth's objections, Atkins' counsel did not ask Lyons any additional questions and advised the court that Lyons was no longer needed as a witness.

L.Ed.2d 788 (1980) (same); *but see O'Dell v. Commonwealth*, 234 Va. 672, 701-02, 364 S.E.2d 491, 508, *cert. denied*, 488 U.S. 871, 109 S.Ct. 186, 102 L.Ed.2d 154 (1988) (holding that hearsay evidence contained in postsentence report is admissible based on language of Code §§ 19.2-264.5 and -299).

In any event, we believe that the information that Atkins sought to elicit from Lyons improperly would have interjected at the new sentencing hearing a question about Atkins' guilt. In that statement to Lyons, Atkins denied that he was the "triggerman" and accused his accomplice of shooting Nesbitt. *Atkins*, 257 Va. at 175, 510 S.E.2d at 455. As we previously stated, a defendant is not allowed to argue or present evidence of "residual doubt" at a new sentencing hearing. *Stockton*, 241 Va. at 211, 402 S.E.2d at 207.

Finally, Atkins contends that the circuit court erred by denying certain proposed instructions on the mitigation factors contained in Code § 19.2-264.4.[6] Specifically, Atkins requested the court to instruct the jury that it may consider, in mitigation, Atkins' age at the time of the offense, his mental retardation, and any other evidence that would tend to favor a sentence of life imprisonment. However, the record before us shows that Atkins withdrew the requested instruction. Regardless, this Court has consistently held that defendants being sentenced for capital murder are not entitled to jury instructions that

[6] Instead, the circuit court instructed the jury that it should consider any evidence presented in mitigation of the offense that tended to make life imprisonment without the possibility of parole a more appropriate punishment than death.

list the specific types of mitigating factors a jury may consider. *George v. Commonwealth*, 242 Va. 264, 283, 411 S.E.2d 12, 23 (1991), *cert. denied*, 503 U.S. 973, 112 S.Ct. 1591, 118 L.Ed.2d 308 (1992); *Eaton v. Commonwealth*, 240 Va. 236, 257, 397 S.E.2d 385, 398 (1990), *cert. denied*, 502 U.S. 824, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991); *Gray v. Commonwealth*, 233 Va. 313, 351, 356 S.E.2d 157, 178, *cert. denied*, 484 U.S. 873, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987). We will not depart from our prior decisions today.

II. ISSUES REGARDING THE JURY

Atkins raises two issues with regard to the composition and selection of the jury. He first contends that the circuit court erred in denying his motion to strike the entire venire because it did not accurately represent the demographic make-up of the population of York County. Second, he challenges the Commonwealth's use of one of its peremptory strikes.

With regard to the first issue, Atkins argued at trial that the venire, which contained only three Black members, did not represent a fair cross-section of the community. According to Atkins' counsel, York County's population is 30 percent Black. In denying Atkins' motion, the circuit court noted that the venire had been randomly selected.

Systematic exclusion of a "distinctive group in the community" must be shown in order to establish that a defendant's constitutional right to a fair jury selection system has been violated. *Chichester v. Commonwealth*, 248 Va. 311, 324, 448 S.E.2d 638, 647 (1994), *cert. denied*, 513 U.S. 1166, 115 S.Ct. 1134, 130 L.Ed.2d 1095 (1995). Atkins

does not contend that there was such exclusion, nor does the record in this case suggest any systematic exclusion of Black members of the community from the venire. Thus, we find no merit in Atkins' claim.

On the second issue, Atkins contends that the Commonwealth's exercise of a peremptory strike to remove the only remaining Black juror violated the rule established in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), holding that peremptory strikes based solely upon a juror's race violate the Equal Protection Clause. In deciding whether a peremptory strike is racially motivated in violation of *Batson*, a trial court "must consider the basis of the challenge[ ], the reasons proffered for the strike [ ], and any argument presented that such reasons, even if race-neutral, are pretextual, to determine whether the challenger has met [the] burden of proving purposeful discrimination in the selection of a jury panel." *Chandler v. Commonwealth*, 249 Va. 270, 277, 455 S.E.2d 219, 223, *cert. denied*, 516 U.S. 889, 116 S.Ct. 233, 133 L.Ed.2d 162 (1995). We will reverse a trial court's findings that there was no purposeful discrimination in the striking of a juror and that the reasons proffered by the Commonwealth were racially neutral only where such findings are clearly erroneous. *Id.*

The juror in question testified that he took medication for a thyroid condition and that the medication caused him to feel "bombed out" and "drowsy" at times. Because of the juror's medical condition, the Commonwealth expressed concern about the juror's ability to pay close attention to the evidence. The circuit court determined that the Commonwealth had proffered a sufficiently race-neutral reason to strike the juror, and we

conclude that this finding was not clearly erroneous. *See Stockton*, 241 Va. at 209, 402 S.E.2d at 205-206 (concern about juror's attentiveness was race-neutral reason for striking juror).

III. MOTION TO STRIKE COMMONWEALTH'S EVIDENCE

Next, Atkins asserts that the circuit court should have granted his motion to strike the Commonwealth's evidence at the new sentencing hearing because that evidence was insufficient to prove either the future dangerousness or the vileness aggravating factor. Atkins makes no argument on this assignment of error beyond this mere assertion. Upon reviewing the record, we find evidence sufficient to prove beyond a reasonable doubt both Atkins' future dangerousness and the vileness of his crime.

To establish the future dangerousness predicate for imposition of the death penalty, the factfinder may consider a defendant's past criminal record, a defendant's prior history, the circumstances surrounding the commission of the offense under consideration, and the heinousness of the crime. *Edmonds v. Commonwealth*, 229 Va. 303, 312, 329 S.E.2d 807, 813, *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985). In the present case, the Commonwealth presented evidence showing that Atkins had at least 18 prior felony convictions for such crimes as attempted robbery, robbery, abduction, breaking and entering with the intent to commit larceny, grand larceny, maiming, and use of a firearm. In addition, the jury not only heard the details of several robberies that Atkins

committed, including one in which Atkins hit a victim over the head with a bottle, but also learned about an incident during which he shot a woman in the stomach without provocation. Thus, we conclude that there was sufficient evidence to support the jury's finding of Atkins' future dangerousness.

With respect to the vileness predicate, Code §§ 19.2-264.2 and – 264.4(C) define vileness as conduct that "was outrageously or wantonly vile, horrible or inhuman" involving "torture, depravity of mind or an aggravated battery to the victim." Proof of either torture, depravity of mind, or an aggravated battery is sufficient to support a finding of vileness. *Bunch v. Commonwealth*, 225 Va. 423, 442, 304 S.E.2d 271, 282, *cert. denied*, 464 U.S. 977, 104 S.Ct. 414, 78 L.Ed.2d 352 (1983).

Based on testimony from the assistant chief medical examiner who autopsied Nesbitt's body, the jury learned that Atkins shot Nesbitt eight times. Three of the gunshots caused mortal wounds. One of those gunshots penetrated the left chest cavity and perforated both lungs and the heart; the second one, to the left lateral back, perforated the right lung and aorta; and the third fatal shot perforated the arm, re-entered the abdomen, and perforated the iliac artery. However, none of the fatal shots was immediately lethal; they would not have caused immediate unconsciousness or paralysis; and Nesbitt may have survived several minutes before dying from internal bleeding. Nesbitt also sustained several scrapes or abrasions, including a large linear abrasion on his right forehead.

This Court has defined the term "aggravated battery" used in Code §§ 19.2-264.2 and -264.4(C) to mean " 'a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.' " *Goins v. Commonwealth*, 251 Va. 442, 468, 470 S.E.2d 114, 131, *cert. denied*, 519 U.S. 887, 117 S.Ct. 222, 136 L.Ed.2d 154 (1996) (quoting *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979)). Thus, we find sufficient evidence to support the jury's finding that Atkins' murder of Nesbitt was "outrageously or wantonly vile." Code §§ 19.2-264.2 and -264.4(C).

IV. PREJUDICE AND PROPORTIONALITY REVIEW

Whenever a sentence of death is imposed, this Court is required to determine whether that sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor; and [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Code § 17.1-313(C). With regard to these two questions, both assigned as errors by Atkins, we initially note that Atkins has presented no argument that his sentence of death was influenced by passion, prejudice or any other arbitrary factor, nor has our review of the record revealed any such improper influence.

With respect to the proportionality question, Atkins does not argue that his death sentence is disproportionate to the penalties imposed for crimes similar to the one he perpetrated, namely premeditated murder with a firearm in the commission of a robbery, where the death penalty

was imposed on the basis of both the future dangerousness and vileness predicates. Nor, given our previous cases, could he do so convincingly because juries in this Commonwealth regularly impose the death penalty for capital murders comparable to the one at issue in this case.[7] *See Graham v. Commonwealth*, 250 Va. 79, 80, 81 and n. *, 83, 89, 459 S.E.2d 97, 97 and n. *, 98-99, 102, *cert. denied*, 516 U.S. 997, 116 S.Ct. 535, 133 L.Ed.2d 440 (1995) (death sentence imposed for murder in commission of robbery based on both vileness and future dangerousness predicates; defendant had 14 prior convictions; victim shot while lying in parking lot); *Strickler v. Commonwealth*, 241 Va. 482, 487-88, 496-98, 404 S.E.2d 227, 231, 236-37, *cert. denied*, 502 U.S. 944, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991) (death sentence imposed upon findings of vileness and future dangerousness where defendant with eight felony convictions took victim to deserted field and killed her; death was not instantaneous); *Gray*, 233 Va. at 341, 352-54, 356 S.E.2d at 172-73, 179-80 (defendant with at least 13 prior felony convictions sentenced to die based on future dangerousness and vileness after forcing victim into his car, taking victim's wallet and robbing victim's store, and then driving to secluded area where defendant shot victim six times after assuring victim that he would

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[7] Pursuant to Code § 17.1-313(E), we have accumulated the records of all capital murder cases reviewed by this Court. Those records include not only cases in which the death penalty was imposed, but also those in which a life sentence was imposed and the defendant appealed to this Court. *Orbe v. Commonwealth*, 258 Va. 390, 404, 519 S.E.2d 808, 816 (1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 1970, 146 L.Ed.2d 800 (2000) (citing *Whitley v. Commonwealth*, 223 Va. 66, 82, 286 S.E.2d 162, 171, *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982)).

not be harmed); *Edmonds*, 229 Va. at 304, 307, 312-14, 329 S.E.2d at 809-10, 813-15 (during robbery, victim sustained multiple wounds including stab wound to neck; defendant had 3 felony and 13 misdemeanor convictions; death sentence imposed based on findings of vileness and future dangerousness); *Briley v. Commonwealth*, 221 Va. 563, 566-68, 578, 580-81, 273 S.E.2d 57, 58-60, 66-68 (1980) (defendant convicted of capital murder in commission of robbery and sentenced to death based on findings of vileness and future dangerousness; victim forced to lie on floor during rape of victim's mother and murder of both parents prior to victim's death by gunshot; defendant had numerous criminal convictions including armed robbery and attempted murder).

Focusing on the statutory directive that this Court's proportionality review take into account not only the crime but also the defendant, *see* Code § 17.1-313(C), Atkins, however, does assert that he is mentally retarded and thus cannot be sentenced to death. He bases his argument upon his purported full scale IQ of 59 and contends that the death penalty has not been imposed on any defendant in this Commonwealth with an IQ score as low as his. In response, the Commonwealth points out that the evidence was in conflict regarding the question whether Atkins is mentally retarded. Quoting from *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the Commonwealth also contends that execution of a defendant who is mentally retarded does not contravene the practices that were condemned when the Bill of Rights was adopted or the evolving standards of decency.

Atkins' full scale IQ score was based on a test known as the Wechsler Adult Intelligence Scale-III (WAIS-III),

which was administered to him by a forensic clinical psychologist, Dr. Evan Stuart Nelson.[8] According to Dr. Nelson, Atkins' full scale IQ of 59 means that Atkins is mildly mentally retarded. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) 40 (1994). However, Dr. Nelson also acknowledged that Atkins might have scored two or three points higher if he had not been mildly depressed when Dr. Nelson administered the test.

Dr. Nelson further explained that a diagnosis of mental retardation is not simply a question of an IQ score. Mental retardation also involves the inability to function independently as compared to the norm for persons of the same age. Consequently, a diagnosis of mental retardation is based on an individual's IQ scores along with that person's ability to function in the world. Finally, despite his opinion that Atkins is mildly mentally retarded, Dr. Nelson admitted that Atkins' capacity to appreciate the criminal nature of his conduct was impaired, but not destroyed; that Atkins understood that it was wrong to shoot Nesbitt; and that Atkins meets the general criteria for the diagnosis of an antisocial personality disorder.

In addition to Dr. Nelson's testimony, the jury heard testimony from Dr. Stanton E. Samenow, a forensic clinical psychologist called as a witness by the Commonwealth. Based on two interviews with Atkins, Dr.

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[8] On the same test, Atkins also had a verbal IQ score of 64 and a performance IQ score of 60.

Samenow "sharply disagree[d]" with Dr. Nelson's conclusion that Atkins is mildly mentally retarded. Instead, Dr. Samenow testified that Atkins is of at least average intelligence. Dr. Samenow based his conclusion on Atkins' vocabulary, knowledge of current events, and other factors from the Wechsler Memory Scale, Wechsler Adult Intelligence Scale and Thematic Apperception Test. For example, Atkins knew that John F. Kennedy was the president in 1961. He also correctly identified the last two presidents, as well as Virginia's current governor. Dr. Samenow further explained that Atkins used "sophisticated words" such as "orchestra," "decimal," and "parable;" that Atkins could recall information Dr. Samenow asked him to remember; and that Atkins could put together a story involving cause and effect.

Dr. Samenow also reviewed Atkins' academic records and noted that, while Atkins had passed the Literacy Passport Test, his academic performance had been terrible and that his school records were "punctuated with statements" by teachers about Atkins' lack of motivation and concentration, his poor study habits, and his ability to do better in school. Finally, Dr. Samenow, like Dr. Nelson, opined that Atkins was able to appreciate the criminality of his conduct and to conform his behavior to the requirements of the law, and that Atkins satisfies most of the criteria for the diagnosis of an antisocial personality disorder.

The Supreme Court of the United States has ruled that imposition of the death penalty on a mentally retarded defendant with the approximate reasoning capacity of a seven-year-old child does not violate the Eighth Amendment prohibition against cruel and unusual

punishment solely because of the defendant's mental retardation. *Penry*, 492 U.S. at 336, 340, 109 S.Ct. 2934. In that case, the Court recognized that the abilities and experiences of mentally retarded individuals vary. Thus, the Court was unwilling to conclude that all mentally retarded people, "by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility[,] inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." *Id.* at 338, 109 S.Ct. 2934. The Court also refused to rely on the concept of "mental age," noting that it is problematic in several respects and that courts have generally been reluctant to use it as a basis for excusing a defendant from criminal responsibility. *Id.* at 339, 109 S.Ct. 2934. However, the Court did state that a "sentencing body must be allowed to consider mental retardation as a mitigating circumstance in making the individualized determination whether death is the appropriate punishment in a particular case." *Id.* at 337-38, 109 S.Ct. 2934.

In Virginia, the mental retardation of a defendant is one of the factors that may be considered in mitigation of capital murder. Code § 19.2-264.4(B). Accordingly, the jury in the present case heard extensive, but conflicting, testimony from Dr. Nelson and Dr. Samenow regarding Atkins' mental retardation. As in any case, it was the responsibility of the jury to assess the credibility of the witnesses and to determine the weight to be afforded to specific evidence. *Yarbrough v. Commonwealth*, 258 Va. 347, 364, 519 S.E.2d 602, 610 (1999). The jury was instructed in the present case to consider any evidence in mitigation of the offense, and the jury obviously found that Atkins' IQ

score did not mitigate his culpability for the murder of Nesbitt. *See Yeatts v. Commonwealth*, 242 Va. 121, 145, 410 S.E.2d 254, 268 (1991), *cert. denied*, 503 U.S. 946, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992) (jury found defendant's mild mental retardation, based on full scale IQ of 70, did not mitigate capital murder offense, and this Court perceived no reason on appeal to disturb that finding). The question of Atkins' mental retardation is a factual one, and as such, it is the function of the factfinder, not this Court, to determine the weight that should be accorded to expert testimony on that issue. *Saunders v. Commonwealth*, 242 Va. 107, 115, 406 S.E.2d 39, 43, *cert. denied*, 502 U.S. 944, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991).

In conducting the mandated proportionality review and examining the records accumulated pursuant to Code § 17.1-313(E), we do not find a capital murder case in which testimony indicated that a defendant had a full scale IQ as low as 59.[9] Because Atkins asserts that he cannot be sentenced to death due to his alleged mental

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[9] In *Mackall v. Commonwealth*, 236 Va. 240, 256, 372 S.E.2d 759, 769 (1988), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3261, 106 L.Ed.2d 607 (1989), we upheld a sentence of death for a defendant with an IQ of 64 who was convicted of capital murder committed during a robbery. *See also Correll v. Commonwealth*, 232 Va. 454, 467, 352 S.E.2d 352, 359 (1987) (death penalty upheld for defendant who scored 68 on IQ test).

In *Freeman v. Commonwealth*, No. 830920 (Va. Jan. 25, 1984), this Court examined the capital murder conviction of a defendant with a full scale IQ of 61. We denied that defendant's petition for appeal, in which the only assigned error was the failure of the trial court to allow him to withdraw his guilty plea. That defendant argued on brief that his "limited intelligence" and "fear" caused him to plead guilty.

retardation, we must consider, as part of our proportionality review, the same evidence heard by the jury regarding Atkins' mental capacity. In examining that evidence, we find it significant that both Dr. Nelson and Dr. Samenow agreed that a diagnosis of mental retardation involves more than merely determining a person's IQ score; it also requires consideration of an individual's adaptive functioning.[10]

With regard to the issue of adaptive functioning, Dr. Nelson testified that, in determining an individual's ability to function independently, it was necessary to talk with family members, and to review school and employment records. He further stated that he had followed through on that inquiry by reviewing Atkins' academic records and talking to Atkins' parents. As a result of the inquiry, Dr. Nelson reported that Atkins had received poor grades, failed many tests and classes, and was placed in remedial academic courses on a number of occasions. He also stated that Atkins' parents described a number of deficits, but Dr. Nelson never elaborated on the nature of those deficits. In other words, Dr. Nelson never identified an area of significant limitation in

---

[10] According to the DSM-IV, "[t]he essential feature of Mental Retardation is significantly subaverage general intellectual functioning . . . that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. . . . " DSM-IV at 39.

Atkins' adaptive functioning other than what he termed Atkins' "academic failure."[11]

In contrast, Dr. Samenow provided the following explanation when asked whether Atkins has any impairment in his adaptive functioning:

> Well, Mr. Atkins never lived independently. In other words, he was not a self-supporting member of society. However, he told me he was able to wash his clothes, wash and dry his clothes, he used his parents' washing machine and dryer. He told me – when I asked him if he was able to cook, he gave me his recipe for cooking chicken.
>
> This Defendant, . . . as I understand it, lived a life in which he didn't work, and I don't mean just didn't hold a job, that he didn't do, but then again there are a lot of 18-year-olds who maybe haven't worked because they've been in school. But he didn't work in school either.
>
> So the point is he chose a certain – to live a certain way of life, and there was no lack of ability to adapt and to take care of basic needs, certainly.

Thus, considering "both the crime and the defendant," Code § 17.1-313(C), and the record before us, we cannot say that Atkins' sentence of death is excessive or disproportionate to sentences generally imposed in this

---

[11] The dissent acknowledges that a diagnosis of mental retardation requires not only a finding of subaverage intellectual functioning but also limitations in two or more adaptive skill areas. However, the dissent is likewise unable to point to any finding by Dr. Nelson regarding deficits in Atkins' adaptive functioning other than his poor academic performance.

Commonwealth for capital murders comparable to Atkins' murder of Nesbitt. We are not willing to commute Atkins' sentence of death to life imprisonment merely because of his IQ score. Dr. Nelson and Dr. Samenow agreed that an IQ score is not the sole definitive measure of mental retardation. Both experts also testified that Atkins was able to appreciate the criminality of his conduct and understood that it was wrong to shoot Nesbitt.

Accordingly, we perceive no reason to commute Atkins' sentence of death and will affirm the judgment of the circuit court.

Affirmed.

HASSELL, Justice, with whom Justice KOONTZ joins, concurring in part and dissenting in part.

I.

Code § 17.1-313, which requires that this Court review a sentence of death, states in relevant part that we must consider "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." I dissent because I believe that the imposition of the sentence of death upon a mentally retarded defendant with an IQ of 59 is excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

II.

Dr. Evan S. Nelson qualified as an expert witness on the subjects of clinical and forensic psychology. He testified on behalf of the defendant, Daryl Renard Atkins. Dr. Nelson reviewed the defendant's school records, psychological test data, and certain information related to the defendant's capital murder conviction and his prior convictions. Dr. Nelson also interviewed members of the defendant's family.

Dr. Nelson administered the Wechsler Adult Score, also referred to as the WAIS-III intelligence test, to the defendant. This test was designed to measure the defendant's IQ. Dr. Nelson stated:

> "There are a number of IQ tests on the market. Some of them are for special niches of population. But the WAIS is one of the two that is recognized throughout the United States as a standard for assessing intelligence.
>
> "It's the one that's most frequently cited, for example, in state laws for identifying who qualifies for a learning disability or a mental retardation, the one that's most often cited in Federal disability laws for making determinations involving an IQ or neurologic deficits."

According to Dr. Nelson, there are 13 major subsections of the test that he administered to the defendant. Dr. Nelson administered all 13 of the major subsections to the defendant and determined that the defendant had a full-scale IQ of 59. Dr. Nelson observed:

> "Mental retardation is about two things. Number one, it's about an IQ of around 70 or below, and there [is] some space there, 70 or

> plus or minus five points is the official criteria. . . .
>
> "Secondly, adaptive behavior. Being mentally retarded isn't just a low score on this test. It's about lacking certain abilities to function independently compared to what you'd expect for other persons your age. That's a really important criteri[on]. Because there are some people who can score really well or really poorly on this test but who either do or don't function well in society. So you have to go out and find out by talking with family members and school records and employment records, if they have any, about how they function in the world at large. You need the two of them together to be able to say someone is mentally retarded."

Dr. Nelson, who is a specialist in the assessment of mental illnesses, opined that the defendant was mentally retarded based upon his IQ score of 59 *and* his limited capacity for adaptive behavior. Dr. Nelson pointed out that in addition to the defendant's low IQ score of 59, the defendant's public school academic records "are crystal clear that he has been an academic failure since the very beginning." Dr. Nelson testified that the "lack of variation" in the defendant's performance on the IQ test indicates that the test was properly administered and that the defendant was not "faking" when he took the test.

Even though the defendant was not classified as mentally retarded when he was a student in the Hampton Public Schools Division, his academic performance was very poor. He scored below the 20th percentile in almost every standardized test he took. He failed the second and

tenth grades. He was socially advanced from the fourth grade to the fifth grade.

When the defendant was an eighth-grade student, he received failing grades in all his classes, and he scored in the 15th percentile of standardized achievement tests. When he was a tenth-grade student, he scored in the 6th percentile. The defendant, when a student in high school, was placed in lower-level classes for slow learners and classes with intensive instruction for remedial deficits. His grade point average in high school was 1.26 out of a possible 4.0. The defendant did not graduate from high school.

Dr. Stanton E. Samenow qualified as an expert witness in the subjects of clinical psychology and forensic psychology. He testified on behalf of the Commonwealth. Dr. Samenow interviewed the defendant twice. Dr. Samenow did not administer an IQ test to the defendant. Rather, he asked the defendant some questions.

Dr. Samenow testified that the defendant was able to relate to him certain recent events and historical facts. For example, the defendant knew the name of the Governor of Virginia and knew that former President John F. Kennedy's son had died in an airplane accident. The defendant was also able to associate certain words and to tell a story utilizing certain pictures. Dr. Samenow did not give the defendant a complete intelligence test, but essentially picked and chose certain questions from various tests to query the defendant.

For example, during cross-examination, Dr. Samenow testified:

"As I indicated . . . I gave portions of the Wechsler Memory Scale, the selected items of the Wechsler Adult Intelligence Scale, namely, from similarities, vocabulary and comprehension, and I also gave the Thematic Apperception Test, which in itself is not an intelligence test but it certainly does give some indication of a person's use of syntax, language, vocabulary, and these were portions. I want to underscore, and I said this yesterday, portions of those tests." Dr. Samenow also gave the following testimony:

"Q: In your interviews with the Defendant, did you ascertain any evidence suggestive of mental retardation?

"A: I found absolutely no evidence other than the IQ score that I knew of, because I reviewed a number of materials. No evidence did I find other than that indicating that the Defendant was in the least bit mentally retarded.

"Q: Do you have an expert opinion as to the Defendant's intellect?

"A: He is of average intelligence, at least.

"Q: Explain the basis of how you came to this conclusion.

"A: Largely though several indices. One is the vocabulary and syntax that he used in talking with me. And I have many examples."

Significantly, Dr. Samenow testified that Dr. Nelson's calculations of the scores on the tests administered to the defendant to ascertain the defendant's IQ were correct. Dr. Samenow did not conduct a full evaluation of the defendant, nor did he use questions from the most recent test when he examined the defendant.

III.

> "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: Communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests itself before age 18."

Carroll J. Jones, *An Introduction to the Nature and Needs of Students with Mild Disabilities: Mild Mental Retardation, Behavior Disorders, and Learning Disabilities*, 39 (1996).

Persons with an IQ level in the range of 50 through 55 to 70 are classified as having mild mental retardation. The following table of diagnostic criteria for mental retardation appears in *Kaplan & Sadock's Comprehensive Textbook of Psychiatry* 2598, Benjamin J. Sadock & Virginia A. Sadock eds., (7th ed. 2000):

"Mental Retardation	IQ range	Mental age (years)
Mild	50-69	9 to under 12
Moderate	35-49	6 to under 9
Severe	20-34	3 to under 6
Profound	Below 20	Less than 3"

According to Doctors Kaplan & Sadock:

> "Mild mental retardation (I.Q., 55 to 70) characterizes the largest group of persons with mental retardation, possibly as many as 85 percent of the total. These individuals appear similar to nonretarded individuals and often blend into the general population in the years before and after formal schooling. Many achieve academic skills at the sixth grade level or higher, and some graduate from high school. As adults, many of these individuals hold jobs, marry, and raise families – yet at times they may appear slow or need extra help negotiating life's problems and tasks."

Id. The evidence of record shows that the defendant's full-scale IQ score of 59 falls within the range considered mild mental retardation. Less than one percent of the American population at large has a score of 59 or below.

I would commute the defendant's sentence of death to life imprisonment without the possibility of parole because I believe that the sentence of death is "excessive . . . to the penalty imposed in similar cases, considering both the crime and the defendant." Upon my independent review of the entire record in this case, *see Vinson v. Commonwealth*, 258 Va. 459, 472, 522 S.E.2d 170, 179 (1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 2226, 147 L.Ed.2d 257 (2000), it is clear that this defendant is mentally retarded. This defendant, who has an IQ of 59 and a limited capacity for adaptive behavior, has the cognitive ability or mental age of a child between 9 and 12 years of age. This Court has never approved of the imposition of the death penalty upon a defendant who is mentally retarded *and* has an IQ as low as 59.

I simply place no credence whatsoever in Dr. Samenow's opinion that the defendant possesses at least average intelligence. I would hold that Dr. Samenow's opinion that the defendant possesses average intelligence is incredulous as a matter of law. Indeed, I am perplexed

that Dr. Samenow, who did not administer a complete IQ test to the defendant and admittedly asked the defendant questions based upon bits and pieces of outdated tests to supposedly evaluate the defendant, would opine that this defendant possesses at least average intelligence.

Dr. Samenow admitted that he does not contest the manner in which Dr. Nelson computed the defendant's IQ scores. Additionally, Dr. Samenow admitted that some of the questions he administered to the defendant were based upon a test developed in 1939. Dr. Samenow described this test as "[a]n old standard," yet, he used this obsolete test even though he acknowledged that the *Ethical Principles of Psychologists and Code of Conduct*, Ethical Standards 2.07 (1992) of the American Psychological Association, prohibits the use of obsolete tests and outdated test results and specifically states that "psychologists do not base such decisions or recommendations on tests and measures that are obsolete and not useful for the current purpose."

Moreover, according to the testimony and medical literature, an assessment of mental retardation is predicated upon the subject's IQ score *and* the subject's adaptive behavior. Dr. Samenow, however, could not validly opine about the defendant's adaptive behavior because he had not interviewed anyone who had observed the defendant prior to his incarceration. Additionally, Dr. Samenow's methodology is flawed because when he improperly administered portions of certain tests, he failed to comply with the relevant instructions for those tests.

Also, I place no credence in Dr. Samenow's opinion that the defendant possesses an average intelligence because of the defendant's vocabulary and his ability to relate certain historical facts to Dr. Samenow. It is common knowledge that many children as young as eight years old are capable of relating the same historical facts that the defendant described and possess a vocabulary similar to the defendant's vocabulary.

I recognize that the United States Supreme Court has held that the imposition of the death penalty upon mentally retarded criminal defendants does not violate the Eighth Amendment to the United States Constitution. *See Penry v. Lynaugh*, 492 U.S. 302, 340, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). However, the issue in this appeal is not whether the imposition of capital punishment upon a mentally retarded criminal defendant violates the federal Constitution. Rather, the issue in this appeal is whether under Code § 17.1-313 the imposition of the sentence of death is excessive or disproportionate to the penalty imposed in similar crimes, considering both the crime and the defendant. I would answer that question in the affirmative. I believe that the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive, considering both the crime and the defendant.

IV.

I recognize that this defendant has a history of violent criminal behavior. I also recognize that this defendant is clearly a significant danger to society. Therefore, I

would commute this defendant's sentence to life imprisonment without the possibility of parole.

KOONTZ, Justice, with whom Justice HASSELL joins, dissenting.

I agree with the view expressed in detail in Justice Hassell's dissent in this case. For the reasons expressed therein and for the following reasons, I would also commute Daryl Renard Atkins' death sentence to imprisonment for life without the possibility of parole. Code §§ 17.1-313 and 53.1-165.1.

Justice Hassell correctly observes that "[t]his Court has never approved the imposition of the death penalty upon a defendant who is mentally retarded and has an IQ as low as 59." In footnote 9, the majority refers to *Mackall v. Commonwealth*, 236 Va. 240, 372 S.E.2d 759 (1988), to note that this Court has upheld, however, a sentence of death for a defendant with an IQ of 64 who was convicted of capital murder committed during a robbery. In another part of its opinion, the majority further correctly notes that "Dr. Nelson also acknowledged that Atkins might have scored two or three points higher if he had not been mildly depressed when Dr. Nelson administered the [IQ] test." In doing so, apparently the majority suggests that there is no significant distinction between Atkins' full scale IQ and that of Mackall. In my view, our statutory mandate under Code § 17.1-313 to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases" does not, and should not, lend itself to mathematical calculations and comparisons of specific degrees of mental retardation of defendants sentenced to death. Unlike the circumstances

existing when *Mackall* was decided, however, the legislature, with the enactment of Code § 53.1-165.1, has effectively provided that a death sentence commuted to a life sentence shall be a life sentence without the possibility of parole. That change in the law is a valid consideration in the determination of whether a particular death sentence is excessive.

Moreover, it is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way. Such must certainly be the case when our system of justice demands, as it does, that even the mentally retarded be held responsible for criminal acts for which the legislature has determined to be properly subject to a death sentence or a sentence of life without the possibility of parole. The choice is clear and limited. In my view, the execution of a mentally retarded individual rather than the imposition of a sentence of life without the possibility of parole is excessive. I would not permit such a result in Atkins' case even though his crime was vile and his guilt undeniable. For these reasons, I respectfully dissent.

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October 1, 2001

WILLIAM K. SUTER
CLERK OF THE COURT

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Mr. Robert E. Lee
Suite 301
2421 Ivy Road
Charlottesville, VA 22901

RE: Daryl R. Atkins v. Virginia
No. 00-8452

Dear Mr. Lee:

The Court today entered the following order in the above-entitled case:

The order entered September 25, 2001 is amended as follows: "The motion for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to the following question: Whether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment."

Very truly yours,

WILLIAM K. SUTER, Clerk

By /s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

cc: Pamela A. Rumpz
Clerk, Supreme Court of Virginia
(Your No. 000395)

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No. 00-8452

In The

Supreme Court of the United States

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Virginia

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OPINIONS BELOW

The Virginia Supreme Court's opinion affirming Atkins's conviction of capital murder but requiring resentencing is *Atkins v. Commonwealth*, 510 S.E. 2d 445 (Va. 1999); JA 574. Its opinion affirming a second death sentence is *Atkins v. Commonwealth*, 534 S.E. 2d 312 (Va. 2000); JA 605.

JURISDICTION

The Virginia Supreme Court affirmed Atkins's sentence September 15, 2000 and denied a timely rehearing petition November 3. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment, made applicable by the Fourteenth, provides:

> "[N]or [shall] cruel and unusual punishments [be] inflicted."

STATEMENT OF THE CASE

1. The Evidence Concerning the Crime

In the early morning of August 17, 1996, Eric Nesbitt, an airman from Langley Air Force Base, was abducted from a 7-11 store in Hampton, Virginia. He was robbed of the money in his wallet, driven in his own truck to an ATM and required to withdraw more money, then driven eighteen miles to York County, where he was shot eight times and killed with a semi-automatic handgun.

The body was discovered less than three hours later. With identifying information found on it, investigators learned Nesbitt's bank account number, called the bank, and obtained the videotape of an ATM transaction that had occurred about 12:15 a.m. (JA 6-7, L1.) The tape showed Nesbitt seated in his truck between two young African-American men, one holding a gun. (L1.) Media

dissemination of photos from the tape produced several calls to the police identifying the driver of the truck as 26-year-old William Jones. (JA 7, 11.) One caller said Jones "ran with" an 18-year-old, Daryl Atkins. (JA 7.) The police obtained Atkins's address from Jones's family (JA 8), found Atkins at home, and arrested him (JA 8). When Nesbitt's truck was reported at a Newport News motel (JA 9), police staked out the motel and arrested Jones there (JA 9, 80).

Atkins gave a statement the day of his arrest, admitting his involvement and identifying Jones as the trigger-man.[1] Jones declined to make a statement. Jones and Atkins were both indicted for capital murder (JA 2, 129) – a crime for which, under Virginia law, only the trigger-man could be convicted.[2] A year later, Jones, with counsel present, told the authorities he had taken part in Nesbitt's abduction and robbery but blamed Atkins for the shooting. (JA 103-04.) Jones was allowed to plead guilty to first-degree murder – a plea that made him ineligible for the death penalty (JA 148-49) – with a requirement that he testify against Atkins. (JA 131-32, 156.) At the guilt phase of Atkins's trial in 1998, two versions of the crime were accordingly presented. Both versions, Jones's and Atkins's, had features that strain credulity.[3]

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[1] The statement – 31-pages taken over two hours (JA 12-14) – was not introduced at trial. It was proffered by the defense but the prosecution objected to it as hearsay. ("Your honor, even Mr. – anyone would understand at the time that they are less culpable and less responsible if they are not the one that pulled the trigger. He knew it then and he knows it now, and his story hasn't changed." (JA 15.)) The objection was sustained. (JA 18.)

[2] *Cheng v. Commonwealth*, 240 Va. 26, 42, 393 S.E.2d 599, 607 (1990). See also, *e.g.*, *Lilly v. Commonwealth*, 258 Va. 548, 551-552, 523 S.E.2d 208, 211-12 (1999).

[3] After Atkins's trial, Jones was sentenced on his plea by Atkins's trial judge, who noted that – while it was up to the jury to assess Jones's credibility at the trial – Jones's "testimony . . . [did] not corroborate any of the forensic facts"

Jones testified that he and Atkins got together at the apartment where Atkins lived with Atkins's father at about 11:30 a.m. on August 16 and spent the day drinking beer and premixed gin and juice, smoking marijuana and watching television while friends dropped by. (JA 39-41.) When alcohol ran out, those present would pool their money (JA 43), and Jones and Atkins would walk to the 7-11 for beer or get a ride to the ABC store for alcohol (JA 42-44).[4]

The last trip to the 7-11 was about 11:30 p.m. (JA 44.) Jones had money for beer but Atkins did not and was going to panhandle for it. (JA 46.) Jones waited nearby while Atkins panhandled, getting change from some people. (JA 47-48.) According to Jones, Atkins had a gun in his belt. (JA 45.[5]) Atkins's version was: "Me and William Jones was on the side of the 7-Eleven, and we was planning to rob somebody. And William Jones had the gun." (JA 164.)

Eric Nesbitt arrived at the 7-11, made purchases, came out of the store, and got into his small purple Nissan truck. Jones's version of what happened next was:

(JA 315). Although (1) the sentencing guidelines called for a sentence between 24 and 40 years, (2) the prosecution requested leniency because of Jones's assistance in convicting Atkins, and (3) Jones's story at Atkins's trial depicted Jones as a follower in the abduction and robbery of Nesbitt who was totally surprised when Atkins unilaterally slew Nesbitt, the judge sentenced Jones to life imprisonment for the murder, saying he exceeded the guidelines because of the "absolute atrocity of this crime" (JA 315).

[4] Atkins's testimony did not discuss events before the last trip to the 7-11. But when interviewed by court-appointed psychologists for both sides, he concurred with Jones that the two were drinking and smoking marijuana for some time before the offense. (JA 288, 482.)

[5] Both testified that the gun had come from a person named Mark, who visited the apartment that evening. (JA 44, 164.)

"Then Mr. Nesbitt backed out and was getting ready to get on Armistead. But Mr. Atkins whistled at him, so Mr. Nesbitt stopped the truck. Mr. Atkins went to the passenger side and I guess Mr. Nesbitt rolled down the window and they started talking. And then I went around to the driver's side" (JA 50); "I just wanted to hear what he was talking about" (JA 50). From the driver's side, Jones saw Atkins pointing a gun at Nesbitt and heard Atkins say, " 'Let my friend drive'." "So [he] got in and Mr. Nesbitt scooted over to the middle and Mr. Atkins got into the passenger side." (JA 51.) Jones realized "at that point" that he was involved in a robbery. (JA 51-52.)

In Atkins's testimony, the roles were reversed. "Then Eric Nesbitt backed out of the parking lot and was coming out the 7-Eleven parking lot. William Jones waved him down. Then he had a conversation with him. So I came up to the driver, that's where he was at, William Jones." (JA 164.) "We started chatting for a while, and then William Jones pulled out the gun." (JA 165.) Jones "told me get around." So Atkins "[g]o around in the passenger." (JA 165.) After Atkins got in the passenger side, Jones got in the driver's side, "handed me the gun with both of his hands and I hold the gun. And then William Jones drove off." (JA 165.)

Jones and Atkins agreed that Jones sped off,[6] sideswiping a vehicle and damaging the driver's door of the truck. (JA 52, 166.) (The accident made it difficult to open the driver's door from the outside, but the door was still easy to open from the inside. (JA 27, 29-30.)) Jones and Atkins also agreed that Atkins initially asked Nesbitt for money. Atkins testified: "I asked Mr. Nesbitt did he have any money. Mr. Nesbitt say yes. He handed me his wallet.

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[6] There is no dispute that throughout the incident, Jones drove the truck. Atkins had failed driver's education twice. (JA 307.)

I looked in his wallet, and it was sixty dollars." (JA 166; see also JA 53.) Atkins took the money out and handed the wallet back to Nesbitt. (JA 166.) But Jones and Atkins disagreed about what happened next. Jones implied that they ended up driving to Nesbitt's bank because there "must not have been enough money or something, . . . [so] the subject came up that Mr. Nesbitt had a bank card" (JA 53), whereas Atkins said that Jones noticed Nesbitt's "credit card" [sic] and "asked him did he have any more money in the bank," after which: "[w]e rode to the bank" (JA 166-67).

At the bank, as Atkins described it: "Eric Nesbitt took out his credit card. He leaned over William Jones, placed his credit card, you know, in the machine. Then he hit the numbers and then he got the money back." (JA 167.) The withdrawal of $200 was filmed on the ATM's videotape, which shows Jones in the driver's seat, Nesbitt in the middle, and Atkins in the passenger seat with the gun. (L1.)

Jones and Atkins discussed what to do with Nesbitt. Jones testified that Jones suggested tying Nesbitt up (JA 61) and Atkins suggested a place in Yorktown "near his grandfather's house" (JA 61-62).[7] In Atkins's version: "[I]t was a discussion of he was going to tie him up, there was a discussion that me and him was going to tie him up and leave him somewhere. But then William Jones said that he know a place and he never told me. And he just

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[7] Atkins's grandfather did live in the vicinity where Nesbitt's body was later found. (JA 3-4, 313.) The grandfather testified that Atkins had not been to his home in three or four years. (JA 5.)

drove." (JA 168.) Jones took the interstate to York, a 35-minute drive (JA 62) on a route Jones knew (JA 64-65).[8]

Jones testified that when they got to where Nesbitt was shot, "Mr. Atkins got out. He directed Mr. Nesbitt out." Atkins still had the gun. (JA 67.) "As soon as Mr. Nesbitt stepped out of the vehicle and probably took two steps, the shooting started." (JA 67.) Jones said he remained in the truck (JA 67) but thought that shots were coming into the vehicle, so: "I had rolled down the window. I tried to get out, and rolled down the window and jumped out . . . [o]n my hands and knees" (JA 67-68), head first, then hands (JA 107). He went around the back of the truck, aiming "[t]o get the gun away from Mr. Atkins" (JA 108), "[t]o stop him from killing [Mr. Nesbitt]" (JA 113-14). He heard one or two shots before getting out of the truck, then two or three more while rounding the truck. (JA 70.) When he reached Atkins, they fought for the gun, and Atkins got shot in the leg. (JA 69, 73, 111.) Atkins dropped the gun and Jones picked it up, touching it for the first time. (JA 73.) Jones put the gun in the truck, then "climbed in the same way [he] got out . . . [f]rom the window of the driver's side." (JA 74.)

Atkins's version was that Jones stopped the truck and "told me to get out, me and Eric Nesbitt to switch places. He never said why. So I hand – he told me to hand him the gun. I hand him the gun. I got out first. Eric Nesbitt got out behind me. I got back in. Eric Nesbitt got back in. William Jones still had the gun. He put it in a

[8] For 13 or 14 years up to "a couple of months" before the crime, Jones had lived in Gloucester. (JA 95.) The turn-off to the murder scene was "just before you go into . . . Gloucester" (JA 105) on Route 17, a road Jones used to take to get to York County from Gloucester (JA 95). Jones drove on Route 17 north of the scene five days a week in 1992 while traveling from Williamsburg, where he previously worked, to Gloucester (JA 147), and he knew the local landmarks like the jail (JA 106), the hospital (JA 96), the 7-11 (JA 105) and the school (JA 148).

holster that he had on his belt, a black nylon holster. Then he drove up the street a little more. And then I noticed it was like a fork in the road. So then he stopped and backed up. And then he backed up, parked the car, and he opened up the door. . . . He told Eric Nesbitt to get out. . . . Eric Nesbitt got out." (JA 169-70.) Atkins was in the truck, "[i]n the middle." (JA 170.) "As Eric Nesbitt was getting out, William Jones got out, too. So by the time Eric Nesbitt got out the vehicle, William Jones was there. He had came around the back of the truck. . . . He – Eric Nesbitt bend over and William Jones told him to get up. And he didn't get up. And then the shooting started." (JA 170-71.) Jones did the shooting. Atkins was still in the truck. (JA 171.) There were a lot of shots. (JA 171.) After they started, Atkins's "leg was hurting, so I reached down to look at my leg. . . . Then I didn't hear no more shots. And then William Jones got inside the driver's – he came back around, got inside the driver's and took off." (JA 172.) Atkins asked Jones why Jones had shot him, and Jones tried to figure out how he shot Atkins. (JA 172.) Atkins asked Jones to take him to the hospital "[b]ecause my leg was hurting." (JA 173.) Atkins also "asked . . . [Jones] where did he shoot him [Nesbitt] at. He said he shot him in the body." (JA 174.)

At the hospital, Jones said, Atkins "started to get out. Before he could leave, I asked him for some money. . . . He just gave me some money, closed the door, and hopped off." (JA 76.) Questioned by a nurse about his injury, Atkins told her he had been shot right outside the hospital by a would-be robber. (JA 24.)[9] His explanation for this lie at trial was that he didn't want her to know he "was involved with a robbery." (JA 174.) The police were called because the injury involved a gunshot wound, and

[9] As the nurse described Atkins's demeanor: "He was not demanding, . . . as, you know, most people would be. He was not demanding. He was reaching out to me." (JA 24-25.) The doctor described Atkins's demeanor as "pleasant and appropriate." (JA 20.)

an officer questioned Atkins. Atkins told this officer he'd been mugged at a park almost two miles away and hopped all the way to the hospital. (JA 18-19.) Atkins had been shot twice in the foot. Both bullets entered from the inside of the left ankle (JA 22-23, 25-26, 210-11) and traveled almost straight across. One exited about an inch below the entrance wound. (JA 210-11.) The other remained lodged in the ankle. (JA 21.) Atkins was treated and released, and he returned to his father's apartment. After his arrest and confession, the bullet in his ankle was removed in the presence of police (JA 10) and found to match two bullets recovered from the victim's body and two recovered from the truck (JA 28).

Jones, meanwhile, left the hospital and drove to the King James Motel in Newport News. (JA 77.) Over several days, he moved from one motel to another and changed his appearance by cutting all his hair off. (JA 81.) He left the truck behind the King James, testifying that the keys and gun were in it when he left it. (JA 78.) The gun was not there when police searched the truck. (JA 27, 29.)

2. The Evidence at Atkins's Sentencing Hearings

The jury convicted Atkins of capital murder. (JA 213.) At the sentencing phase, the prosecution submitted the exhibits from the guilt phase as evidence of the "vileness" of the crime. (JA 264-66.) As evidence of "future dangerousness," it presented records of Atkins's prior felony convictions (JA 248-49) and the testimony of four of the felony victims (JA 214-37).[10]

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[10] A more complete record of Atkins's prior convictions was presented at resentencing. See note 20 *infra*. At the initial sentencing, the prosecution also presented victim impact evidence from Nesbitt's friend (JA 237-40) and Nesbitt's mother (JA 240-48).

The defense presented one witness, Dr. Evan Nelson, a clinical psychologist with a post-doctoral residency in forensic psychology (JA 267),[11] who had evaluated Atkins before trial (JA 268).[12] Dr. Nelson had administered the WAIS-III intelligence test to Atkins[13] and found that Atkins had a full scale IQ of 59, falling "in the range of being mildly mentally retarded" (JA 269).[14] Dr. Nelson

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[11] In addition to his work in court cases, Dr. Nelson performed evaluations for the Social Security Administration to determine eligibility for disability income, including disability based on mental retardation. (JA 280.)

[12] Dr. Nelson interviewed Atkins, Atkins's family, and deputies at the jail where Atkins had been incarcerated for the preceding 18 months. He also reviewed Atkins's school records, court records relating to his prior offenses, statements by Atkins and Jones, and investigative reports relating to the current offense. (JA 268-69.)

[13] The Wechsler Adult Intelligence Scales, third revision (known in the profession as the WAIS-III) is a standard intelligence test that has been validated and standardized using sophisticated psychometric methods. As Dr. Nelson explained, "[t]here are standard rules for administering each part of the test. The rules are laid out in a very thick manual that tells you precisely how to lay down the stimulus cards, the pictures that somebody might be dealing with, what order to put them in. The precise time limits for the amount of time that an individual has to solve a given problem and get an answer." (JA 271.) The test is scored by taking the number of points earned on different subtests, and using a mathematical formula to convert this "raw score" into a "scaled score." The scaled score encompasses a range of raw scores. ALAN S. KAUFMAN & ELIZABETH O. LICHTENBERGER, ESSENTIALS OF WAIS-III ASSESSMENT 60 (1999).

[14] Atkins's score of 59 put him just above the range for "moderate" mental retardation. The line between "moderate" and "mild" retardation is in the zone of 50 to 55. Since the standard error of measurement for IQ testing is five (see AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (text revision, 4th ed. 2000) [hereafter DSM-IV-TR]), Atkins's "true score" is bounded by 54 and 64.

testified he had confirmed the IQ score by looking both at telltales within the test that would reveal "faking" and at independent information about whether Atkins functioned consistently with such a low score. (JA 271-73.)[15] He found that Atkins's academic record, his level of functioning at home, and court records describing Atkins as "slow" (TT 1257) were all consistent with mental retardation (JA 275-81, 309).[16] Atkins's score put him below the lowest one percentile of the population for intelligence. (JA 274.)

Atkins's academic failure began early. He flunked second grade and was held back (JA 276-77), the school transcript noting: "work of grade too difficult" (JA 277). He struggled in third grade, getting 5 Cs, 2 Bs and 3 Ss ("satisfactories"). He was "socially promoted" from fourth to fifth grade, meaning that he was moved up without regard for whether he had been able to learn the fourth grade material. His grades in fourth grade were 4 Fs, 3 Ds, 2 Ss. He improved slightly in fifth grade: 2 Fs, 6 Ds and 2 Ss. Dr. Nelson had no records for sixth grade. In seventh grade, Atkins got one F, 4 Ds and one C. He was finally referred for testing for special education, but,

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[15] Dr. Nelson's check to assure the validity of the score was routine and not a result of any suspicions particular to Atkins's case. Indeed, as Dr. Nelson testified, "Atkins never claimed any symptoms, never made any effort to present himself or bring up, for example, the term mental retardation in any way, shape, or form. There's no reason to think that this was an active part of his plan, especially when looking at all the school records." (JA 286.) Dr. Nelson may have been specially attuned to the issue because of his special expertise on malingering. (JA 285.)

[16] Dr. Nelson did not testify specifically about Atkins's deficits in adaptive skills but included some of that information in his report (JA 302-11). He found that Atkins "had a reduced repertoire of behaviors consistent with a limited intellect. . . . " (JA 309.) See note 24 *infra*.

inexplicably, did not receive it. (JA 277.) Instead, he was put in the lowest of three tracks (JA 307) and moved on to eighth grade, where he received all Fs (JA 277). The transcript notes that he did not meet the requirements for promotion to high school. Yet, he was placed in high school. (JA 277-78.)[17] In ninth grade, his average was D+. The first time through tenth grade, it fell to D-. It stayed there in his second try at tenth grade. His sole success in school came in those high-school years when he was placed in a structured environment for slow learners, with a student-teacher ratio of eight to one. Only then was he able to earn some Bs and Cs, and even one A. (JA 278-79.) Atkins left school without graduating.

Dr. Nelson found that "limited intellect has been a part of Daryl his entire life. . . . He is a slow learner and has been since as soon as we could start to take measures in second grade." (JA 278.) As Dr. Nelson explained, people with mental retardation "are slow to learn and . . . it starts to affect their social functioning." (JA 280.) They "start turning to peer relations as their primary way of feeling good . . . like they are mastering and doing something in their life because they are not going to make it in the academic sphere." (JA 280.) With peers, "people who are mentally retarded are not leaders. They tend to fall into groups because they can't make good decisions on their own. And when you look at their behavior patterns when they do things in groups, they look like they're doing better and when they do things on their own, they tend to do things in a fairly inept way."

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[17] A memorandum read to Dr. Nelson by the prosecutor at resentencing indicated that the superintendent of the Hampton City Schools had instituted a policy of moving failing students to high school but classifying them as "ungraded." (JA 469.) This explains Atkins's "promotion" and some confusion in the record about what grades he was in after the eighth (see JA 278).

(JA 280-81.)[18] Atkins's limited intellect would result in "reduced judgments and reduced understanding of the world in general around him compared to others." (JA 290.) Whether or not a retarded person is literate, "it's harder to reason, it's harder to learn any kind of new information or skill." (JA 280.)[19]

The jury sentenced Atkins to death. On appeal, the Virginia Supreme Court affirmed Atkins's conviction but

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[18] As an example, Dr. Nelson noted that Atkins's "successful" robberies "are all ones where he has the help of other people. The time that he tries to do it by himself, he doesn't get to the robbery part." (JA 291.) The only victim shot was the victim of the attempted robbery, when Atkins was alone, so the group may also have served as an inhibiting factor. (JA 291.)

[19] Dr. Nelson testified that Atkins had several risk factors for being a danger to others if he lived in society – (1) his age (JA 281); (2) his prior history of violence (JA 282); (3) his substance abuse (JA 284), which court records indicated began in eighth grade (JA 293); and (4) the fact that he did not live with both his parents continuously until the age of 16 (JA 284) – but that Atkins would be a very low risk in a prison environment where substances were difficult to obtain, where he would be subject to prison control and discipline, and where he would live in a structured environment. ("[H]e does well in jail and prison" because of the level of supervision there. "As a retarded individual, he needs additional supervision to do better. When you leave him on his own, he does things that are just plain, old-fashioned dumb." (JA 291.)) Dr. Nelson found that Atkins's behavior in jail in the eighteen months between arrest and trial corroborated this opinion. (JA 283.) "The issue is here that he is a mildly retarded individual who in the community has access to drugs and a lack of structure. And that explains a lot of how he gets involved in those violent behaviors. But within the structure of the jail and prison environment, his access to drugs is extremely poor. The structure that a retarded person needs to keep them thinking straightly, knowing the rules, knowing what to do has been imposed and his behavior is very good." (JA 284.)

reversed for resentencing because of a misleading verdict form. (*Atkins v. Commonwealth*, 510 S.E. 2d 445 (Va. 1999).)

At resentencing, the prosecution called the medical examiner (JA 388-404) and investigating officer (JA 372-87) who had testified at the guilt phase of the original trial; and it again introduced the autopsy and other guilt-phase exhibits and the videotape of the ATM transaction to prove "vileness." Its "future-dangerousness" evidence again consisted of disposition orders from Atkins's prior convictions (JA 404-05) and testimony from some of the victims of the underlying offenses (JA 405-13).[20] It also

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[20] Atkins had been involved in six prior incidents, resulting in convictions of 21 felonies. One of the incidents occurred when Atkins was 13 years old and was convicted of breaking and entering and petty larceny. (JA 488.) Four years later, at seventeen, he was convicted of two counts of grand larceny for stealing from two other boys, and he received a sentence of 120 days incarceration, to be served on weekends. (JA 490.) Then, between late April and mid-August of 1996, he committed two robberies, an attempted robbery, and a burglary. He confessed to all of these incidents at the time he was arrested for Nesbitt's murder, and he was convicted of them largely on the basis of those confessions. (JA 16, 17, 318, 414.)

As described at sentencing and re-sentencing, in the first of the incidents – on April 29, 1996 – four friends were robbed at gunpoint near a phone booth. (JA 214-15, 405-08.) There were four robbers, including Atkins. Atkins did not have the gun. (JA 217, 407.) At one point, Atkins asked one of the victims "what . . . [he] was looking at." When the victim didn't answer, Atkins hit him on the head with a bottle. (JA 215, 406.) The bottle bounced off the victim's head. (JA 406.) The victim, who was not injured, got up to go after Atkins, and Atkins ran away. (JA 215, 223, 406, 407.) The incident resulted in eight felony convictions for Atkins. (JA 491-92, 495-506, 517-18.) Two months later – in late June – a pizza deliveryman was robbed at gunpoint by four people, including Atkins. (JA 226-27, 409-10.) Atkins did not have the gun. (JA 410.) After the victim's pockets were emptied, two of the robbers ran away (JA 227), while a third got behind the wheel of the victim's car and drove off with the gunman and

presented victim-impact testimony by Nesbitt's mother and co-workers. (JA 337-72.)

The defense presented three witnesses: Atkins's father, grandmother, and Dr. Nelson. Atkins's father testified about his divorce from Atkins's mother when Atkins was eight years old (JA 414-18); about Atkins's enrollment in a "skill center" program because of failing grades in high school (JA 416); and about the father's regular prison visits with Atkins after Atkins's initial trial (JA 419-20). He described his son as "a follower," and his own uneasiness about having William Jones around his son. (JA 421.)[21] Atkins's grandmother testified to her limited contact with Atkins before the offense and her consistent visitation since. (JA 423-27.)

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the victim (JA 227, 410). Atkins was one of the two who ran. The incident resulted in four felony convictions for Atkins. (JA 509-16.) In the final incident – in early August – Atkins alone approached a woman as she was backing her lawnmower into her shed. Atkins came up next to her and held a gun to her head. After some conversation which she could not recall, he ordered her around to the front of the house, hit her with the pistol and knocked her down, helped her up, then walked away around to her driveway. (JA 234-35, 411-12.) She stood in front of the house watching him go. Then he came back toward her, shot her in the stomach, and left. (JA 236, 412.) He was convicted of attempted robbery and three other felonies. (JA 294-301, 493-94, 507-08, 519-22.)

[21] Atkins's father had no specific knowledge of the trouble Atkins was getting into since Atkins moved in with his father three or four months before the murder of Nesbitt. (JA 420-21.) The father worked the second shift at the shipyard, from 4:00 p.m. to midnight, leaving Atkins home alone. (JA 418-19.)

Dr. Nelson again testified to Atkins's IQ of 59. (JA 438.)[22] He detailed the procedure and professional standards for diagnosing mental retardation. As he explained, a diagnostician must obtain an IQ score through testing with a currently validated test,[23] following the prescribed protocols for that test (JA 432-38), and must also determine through independent investigation whether the person being examined has demonstrated deficits in adaptive skills (JA 441). Dr. Nelson had reviewed Atkins's educational and family history and had found out that Atkins displayed "a number of deficits compared to what you'd expect an 18-year-old to be able to do on his own." (JA 441-42.) In fact, Atkins showed a "lack of success in pretty much every domain of his life." (JA 442.)[24]

Dr. Nelson summarized Atkins's grades in school (see pp. 10-11 *supra*) and his performance on standardized achievement tests. Atkins always fell below the twentieth percentile, and his scores grew progressively worse "falling behind his grade level in terms of his ability to read, write and do math. . . . [H]is academic

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[22] Dr. Nelson did not perform further testing after Atkins's initial sentencing, but he did continue to examine Atkins's functioning, reviewing institutional records for the period of incarceration since Atkins's first trial. (JA 446.)

[23] Dr. Nelson noted that the WAIS-III, which he used to test Atkins's IQ (JA 431), is the test most frequently cited in federal disability laws and state laws for identifying who has mental retardation. (JA 431.)

[24] Dr. Nelson's oral testimony did not develop the specifics of Atkins's deficits, but his written report cited Atkins's inability to do his own laundry, prepare meals for himself, live on his own, and perform "other basic life skills that most defendants his age have mastered" (JA 309). The prosecution did not cross-examine Dr. Nelson on his conclusion that Atkins had substantial deficits in basic life skills.

skills aren't keeping pace with everybody else." (JA 468.) "The fact that it started back in elementary school is an indication. There are some people that hit their teenage years and just stop trying. But the fact that he's having problems with focusing, with attention, with getting good grades starting as early as first grade, and is consistent all the way through, is what suggests mental retardation as compared to somebody who is just a teenager who is rebelling against the system." (JA 468.)

Dr. Nelson explained that as a general rule, and as regards Daryl Atkins specifically, people with mental retardation "are just not good in social relations. They often end up either bunching up with kids who are a lot younger than them, because that's where they are emotionally, or they end up affiliating with people who are a lot older than them and they are going along with the crowd . . . in part because they want to fit in and in part because their own ability to apply social reasoning and make more independent decisions is impaired." (JA 444.) "As a rule, [people with Atkins's IQ] are more likely to be followers [than leaders]. You're more likely to see these folks in offenses that involve groups of people and going along with the crowd." (JA 451-52.)[25] Overall, Dr. Nelson explained, people with mental retardation "are just slow learners. . . . That means a lot of different things. It means that it is harder for them to succeed in school and they are quicker to get frustrated. It means it's harder for them to do just about anything in life, whether it's to get a job or work out a relationship, benefit from the feedback of a

[25] There was nothing in the information Dr. Nelson had obtained about Atkins's background to indicate that Atkins was ever a leader. (JA 452.)

supervisor or the teacher, and they just don't get as far." (JA 444.)[26]

In rebuttal, the State presented the testimony of Dr. Stanton Samenow. Dr. Samenow testified that in his opinion, Atkins was of "average intelligence, at least." (JA 476.) He formed this opinion on the basis of two interviews with Atkins (JA 473-74), a review of Atkins's school records (JA 480), and interviews with correctional staff. He did not administer an intelligence test to Atkins, nor did he interview anyone who had any information about Atkins's functioning outside of custody or before the present offense. (JA 530.)

Instead, Dr. Samenow picked out some questions from the outdated 1972 version of the Wechsler Memory Scale (JA 524-25)[27] and some items from the similarities, vocabulary and comprehension subtests of the WAIS-III (JA 525),[28] and he asked Atkins to answer those questions in isolation. Through this admittedly unorthodox procedure (see JA 526), Dr. Samenow learned and told the jury that "in several instances, . . . [Atkins] did give a fuller response [than he had given when Dr. Nelson had

[26] Finally, Dr. Nelson testified again to Atkins's low risk for violence in a prison setting (JA 445-51), while acknowledging that Atkins would have a high risk for violence in the community outside of prison (JA 461-63).

[27] When confronted with the ethical standards of the American Psychological Association forbidding an evaluation to be based on outdated tests such as he had used, Dr. Samenow replied that he was not "doing a full evaluation with testing" (JA 529) but just "wanted to know was this man retarded or wasn't he" (JA 529).

[28] Dr. Samenow took the questions from Dr. Nelson's raw data, because he did not have copies of the WAIS-III or the manual governing it in his office. (JA 525.)

administered the complete WAIS-III] indicating that . . . [Atkins] had a better understanding of the word than he had indicated with Dr. Nelson." (JA 480.)[29] Dr.

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[29] These "fuller responses" were elicited by Dr. Samenow's efforts to "push . . . [Atkins] just a little bit to see whether, in fact, perhaps he knew more than he had indicated previously." (JA 479.) The nature of the pushing was revealed on cross examination:

> "Q. Do you know what the query is that you're – the test says you're supposed to do?
>
> "A. I don't have the booklet in front of me, but I believe you can ask the person to tell you more.
>
> "Q. Tell me more about it?
>
> "A. Yes.
>
> "Q. But that's not what you said. You said, 'How else are they alike?'
>
> "A. That's absolutely right. . . . I wanted to know if this man knew how the two were alike.
>
> "Q. All right. Now, that's not the standard practice and not the instructions –
>
> "A. Absolutely not. I was interested here in what this man knew. That was critical.
>
> "Q. Doctor, then, if you don't administer this test or these tests in accordance with the instructions, your test results are no good, are they?
>
> "A. My test results are perfectly good because the man either knows the answer or he doesn't know the answer. And this man is content with sitting there doing the least, and if you push him a little he comes up with the answer in many cases. That is what I wanted to know." (JA 526-27.)

Compare KAUFMAN & LICHTENBERGER, 25-26:

> "At times, an examinee's response may be too vague or ambiguous to score. When such answers are given, you need to ask the examinee to clarify his or her response. . . . The key is incompleteness or ambiguity. . . . If a completely incorrect answer is spontaneously produced by the examinee, you do not want to query."

Samenow also noted Atkins's ability to relate the names of the current and former Presidents of the United States; Atkins's answer ("Kennedy") to Samenow's question "Who died last week?" (asked the week after the bannerline plane crash), and Atkins's ability to identify "Kennedy" as the son of former President "JFK"; Atkins's knowledge of how many pennies, nickels, dimes and quarters are in a dollar; Atkins's ability to recite that "pi is 3.15"; and Atkins's use of some polysyllabic words.[30] (JA 477-80.)

Regarding Atkins's lifelong academic failure, Dr. Samenow attributed his "terrible" performance (JA 480) to a bad "attitude" (JA 481). Dr. Samenow pointed to

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[30] Dr. Samenow cited Atkins's vocabulary "and syntax" as evidence of his normal intelligence. (JA 476.) He gave the following examples: (1) Atkins said his mother "encouraged" him to do better in school. (JA 476.) (2) When Samenow asked how it was to be imprisoned, Atkins replied that "he gets frustrated;" when Samenow then asked, " 'What's frustrating?,' " Atkins answered, " 'Well, being in here' "; and when Samenow asked, " 'Well, what do you mean?,' " Atkins replied, " 'Well, that comes automatic.' " (JA 476.) (3) When Samenow asked if Atkins thought he was basically a good person, Atkins replied: "Half and half. . . . There's the half that doesn't want to get into trouble, all the positive stuff." (JA 476-77.) (4) In answering Samenow's questions about a picture of a boy with a violin, Atkins used the word "orchestra." (JA 478.) (5) Atkins used terms like "parable," "deja vu," and "being a psychic" correctly (JA 479-80) (although Samenow did not quote Atkins's uses of these terms) and also used some sophisticated mathematical vocabulary (as to which, Samenow quoted Atkins as saying: " 'I can do math, subtraction, Algebra, Geometry, fractions, decimals, reciprocal fractions. Money, I can count good, add good, but I failed math. I ain't do nothing.' " (JA 480).

teachers' comments about Atkins's lack of concentration, poor study habits, lack of motivation, a constant problem with authority, tardiness, loitering, disciplinary problems (JA 481), and concluded: "So this is a person who chose to pay attention sometimes, not to pay attention others, and did poorly because he did not want to do what he was required to do" (JA 481). Dr. Samenow found that Atkins did not have any deficits in adaptive functioning because Atkins told Dr. Samenow how Atkins could clean his clothes and cook chicken. (JA 483-84.)[31]

In conclusion, Dr. Samenow testified that Atkins was not mentally retarded (JA 482-84; see also JA 476); that Atkins was diagnosable as having antisocial personality disorder (JA 485); and that his antisocial personality disorder indicated that he would be a risk for the future (JA 486). The jury sentenced Atkins to death, and his sentence was affirmed on appeal despite his claims that his retardation made it excessive and violative of the Eighth Amendment (*Atkins v. Commonwealth*, 534 S.E. 2d 312 (Va. 2000)).[32]

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[31] However, at a later point in his testimony, when opining on Atkins's "future dangerousness," Dr. Samenow noted that Atkins "has an extremely inflated view of himself." (JA 534-35.) And in any event, as Dr. Nelson pointed out, it is inappropriate for an evaluator assessing mental retardation to determine the adaptive skills levels of the person being evaluated solely on the basis of that person's self-reporting. "[H]e could be exaggerating what he can do. It's just like people who are illiterate often say, oh, yeah, I can read that, but they really can't because it's embarrassing to say otherwise." (JA 442.) "For the most part, folks who are mentally limited overestimate what they can do." (JA 442.)

[32] The way the federal issue was presented on appeal has been described in Petitioner's Reply to Respondent's Motion to Dismiss Writ of Certiorari as Improvidently Granted. That motion having been denied, we will not burden the Court with another description.

SUMMARY OF ARGUMENT

To inflict a death sentence on a person suffering from mental retardation is incompatible with the Eighth Amendment. Mental retardation profoundly limits a defendant's personal culpability for his or her actions. By definition, anyone who has this disability is within the lowest 3 per cent of the population in measured intelligence. That intellectual limitation also causes, by definition, substantial reduction in the individual's ability to cope with everyday life. Impairments in a wide array of areas are the inevitable consequence. But the essence of the disability is that the individual possesses a dramatically constricted understanding of the world. Such a diminished level of comprehension is inconsistent with the degree of culpability that is the necessary predicate for the infliction of the extreme penalty.

The right vouchsafed by *Penry v. Lynaugh* (*Penry I*) to plead mental retardation in mitigation on a case-by-case basis is insufficient to prevent the risk that retarded persons will be sentenced to death despite their lack of the requisite culpability – and even, in some cases despite their innocence – because the characteristics of their condition make them unusually susceptible to mistaken and arbitrary condemnation.

The American people have reached a clear consensus that the reduced culpability of defendants with mental retardation makes them inappropriate subjects for capital punishment. There is no substantial dissent from this conclusion in any State or region of the country. In dramatic developments in the years since *Penry I*, the legislatures in State after State have also concluded that these defendants can only be protected adequately by a categorical ban on their execution. A consensus whose

expression is this clear constitutes a reliable indicator of evolving standards of decency, and commands recognition under the Eighth Amendment.

Because Daryl Atkins is a man with clearly documented mental retardation that has been manifest throughout his life, his sentence of death is a cruel and unusual punishment.

ARGUMENT

I. A PROCEDURE THAT PERMITS THE DEATH PENALTY TO BE INFLICTED ON DEFENDANTS WITH MENTAL RETARDATION DESPITE THEIR DIMINISHED PERSONAL CULPABILITY VIOLATES THE EIGHTH AMENDMENT

A. Mental retardation impairs understanding and functioning in ways that substantially reduce personal culpability

Mental retardation is a distinct and readily diagnosable form of mental disability. The clinical diagnosis of mental retardation requires three distinct findings, involving (1) psychometric verification and measurement of the severity of an individual's cognitive impairment; (2) a clinical determination that the impairment demonstrated by the testing has an actual disabling effect on the individual's ability to function in the everyday world; and (3) documentation that the onset of the disability occurred early in life. The American Association on Mental Retardation has formulated these exacting criteria in the following terms:

> Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) [hereafter AAMR, MENTAL RETARDATION].[33] Each of the three elements is an essential component of a professional diagnosis of mental retardation.

The crux of the clinical assessment of mental retardation is measuring the magnitude of the individual's intellectual impairment. To be classified as mentally retarded, an individual must be found to be functioning at the very lowest intellectual level encountered in the general population, as measured by standardized intelligence tests. The intellectual functioning of any individual with mental retardation will fall within the lowest 3 per cent of the

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[33] The formulation of the definition of mental retardation by the American Psychiatric Association is essentially identical:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A), that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

DSM-IV-TR 41. See also AMERICAN PSYCHOLOGICAL ASSOCIATION, MANUAL OF DIAGNOSIS AND PROFESSIONAL PRACTICE IN MENTAL RETARDATION 13 (John W. Jacobson & James A. Mulick eds., 1996).

whole population.[34] Thus, the first prerequisite for a diagnosis of mental retardation is severely impaired cognitive functioning.

The second requirement serves to confirm the reality of the psychometric measurement of the individual's severe impairment. It is that the impairment must be observed to have "real-world" effects on the individual's life functioning. As this Court has noted, all people with mental retardation "have a reduced ability to cope with and function in the everyday world." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985). The requirement of real, identifiable disabling consequences in the individual's life – of reduced ability to "cope with common life demands," DSM-IV-TR 42 – assures that the diagnosis applies only to persons with an actual, functional disability. See also AAMR, MENTAL RETARDATION 38. Previous versions of the definition of mental retardation expressed this requirement in terms of "deficits in adaptive behavior," see *Penry v. Lynaugh*, 492 U.S. 302, 308 n.1 (1989) (citing an earlier edition of the AAMR's classification manual), while more recent formulations employ the terms "related limitations" in "adaptive skill areas." AAMR, MENTAL RETARDATION 5; and see DSM-IV-TR 42. Both sets of terms reflect the same concept: that the impairment in intellectual ability must have an actual impact on everyday functioning.

The third definitional requirement is that the disabling condition must have manifested itself during the

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[34] See, *e.g.*, *Amici Curiae* Brief of American Psychological Association, American Psychiatric Association, and American Academy of Psychiatry and the Law in *McCarver v. North Carolina*, No. 00-8727, at 7 ("studies invariably put the number [of people with mental retardation] at less than 3% of the general population, usually in the 1% to 3% range").

developmental period of life. Requiring the disability to have occurred at birth or during childhood means that the individual's mental development during his or her crucial early years was affected by the impairment of the brain's ability to function. This element of the definition is derived from the understanding of modern neuroscience about the way the brain develops and the implications of its arrested development for cognitive impairment. See AAMR, MENTAL RETARDATION 16-18. In practical terms, it means that any individual with mental retardation not only has a measurable and substantial disability now, but that he or she also had it during childhood, significantly reducing the ability to learn and gain an understanding of the world during life's formative years.

Because the cognitive impairment is present during the individual's childhood, it has a compounding effect. Negative feedback received in early social development operates to further impair emotional and adaptive growth. Johnny L. Matson & Virginia E. Fee, *Social Skills Difficulties Among Persons With Mental Retardation*, in HANDBOOK OF MENTAL RETARDATION 471 (Johnny L. Matson & James A. Mulick eds., 2d ed. 1991); see generally Harvey N. Switzky, *Mental Retardation and the Neglected Construct of Motivation*, 32 EDUC. & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES 194, 195 (1997). A "history of failure, social deprivation, and cognitive deficiencies" leads to "high levels of anxiety regarding . . . [the] ability to cope with . . . life experiences." Harvey N. Switzky, *Individual Differences in Personality and Motivational Systems in Persons with Mental Retardation*, in ELLIS' HANDBOOK OF MENTAL DEFICIENCY, PSYCHOLOGICAL THEORY, AND RESEARCH 343, 346 (William E. MacLean, Jr., ed., 1997). The resulting emotional and behavioral problems cause mentally retarded individuals to display disruptiveness, attention deficit problems, low self-esteem, overactivity, distractibility, and difficulties

with interpersonal relationships. MARY BEIRNE-SMITH, JAMES R. PATTON & RICHARD ITTENBACH, MENTAL RETARDATION 216 (1994); see generally Josephine C. Jenkinson, *Factors Affecting Decision-Making by Young Adults with Intellectual Disabilities*, 104 AM. J. MENTAL RETARDATION 320, 321 (1999). Mentally retarded persons often act impulsively, as it is "difficult for them to control, direct, or modify their drives and impulses effectively." Rachel Levy-Shiff, Peri Kedem & Zamira Sevillia, *Ego Identity in Mentally Retarded Adolescents*, 94 AM. J. MENTAL RETARDATION 541, 547 (1990) (noting that behavioral problems are often reported among retarded adolescents); see also, *e.g.*, Thomas L. Whitman, *Self Regulation and Mental Retardation*, 94 AM. J. MENTAL RETARDATION 347, 360 (1990); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 429 (1985). This interplay between cognitive and adaptive deficiencies during the developmental period impairs moral development as well. AAMR, MENTAL RETARDATION 9, 40. See generally Richard M. Gargiulo & Janet A. Sulick, *Moral Judgment in Retarded and Nonretarded School Age Children*, 99 J. PSYCHOL. 23, 25 (1978) (noting that "cognitive development serves as a mediator of moral judgment"); Joan E. Perry & Dennis Krebs, *Role-Taking, Moral Development, and Mental Retardation*, 136 J. GENETIC PSYCHOL. 95, 102 (1980).

B. A sentence of death is grossly disproportionate to the personal culpability of defendants afflicted by mental retardation

This Court has repeatedly emphasized the central importance of personal culpability in capital sentencing and has identified four principles to guide the inquiry whether an individual's behavior is sufficiently culpable to warrant a death sentence consistently with the Eighth

Amendment's prohibition of " 'excessive' " punishments.[35] *First*, the death penalty "takes as its predicate the existence of a fully rational, choosing agent." *Thompson v. Oklahoma*, 487 U.S. 815, 825-26 n.23 (1988). This predicate is grounded in the fundamental principle that "the more purposeful is the criminal conduct, . . . the more seriously it ought to be punished." *Tison v. Arizona*, 481 U.S. 137, 156 (1987). As a result, the death penalty is an appropriate punishment for those who deliberate or act with calculus, *Enmund v. Florida*, 458 U.S. 782, 799 (1982), but is a disproportionate penalty for those with "an immature, undeveloped ability to reason," *Thompson*, 487 U.S. at 835 n.43 (internal quotation omitted), or those without the capacity to make a fully reasoned choice.

Second, capital punishment is appropriate only for one who has the capacity to "evaluate the consequences of his conduct," *Penry I*, 492 U.S. at 322, both in terms of the consequences of the crime (the likelihood of death; the gravity of loss of life), and in terms of the connection between that crime and the punishment for it. For example, this Court has held that the death penalty is appropriate for a person who "knowingly, engage[s] in criminal activities known to carry a grave risk of death," *Tison*, 481 U.S. at 157, and who thus appreciates the causal connection between his criminal act and the death of his victim. Conversely, the Court has said that death is inappropriate for those who "wholly lack[ ] the capacity to appreciate the wrongfulness of their actions," *Penry I*, 492 U.S. at 333 (discussing the common law prohibition on executing "idiots"), or who lack the "comprehension of why . . . [they have] been singled out" for the punishment of death, *Ford v. Wainwright*, 477 U.S. 399, 409 (1986).

Third, the punishment of death is sufficiently related to an individual's personal culpability only when he or

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[35] *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (lead opinion).

she can fairly be expected to conform to the behavior of a responsible, mature citizen. Society presumes that individuals are capable of conforming to its basic norms and deserve the fullest measure of punishment if they fail to do so. Nevertheless, there are exceptions to this presumption. Children who commit murder, for example, are not as culpable as adults because they are "less mature and responsible" and often have "less capacity to control their conduct." *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 & n.11 (1982) (plurality opinion). Because adolescence is "a time of great . . . stress," and children often lack the tools to manage these stresses adequately, they are "not prepared to assume the full responsibilities" of adulthood. *Thompson*, 487 U.S. at 835 n.42 and at 825. For this reason, "their irresponsible conduct is not as morally reprehensible." *Id.* at 835. So even those minors under the age of 16 who can be convicted of murder cannot constitutionally be sentenced to death.

Finally, the death penalty is proportionate only when a defendant's individual culpability and personal responsibility warrant the sanction of death. *Tison*, 481 U.S. at 149; *Enmund*, 458 U.S. at 801; see *id.* at 798 ("The focus must be *his* culpability. . . . "). On the one hand, the law recognizes that reckless behavior resulting in death – even if the death was "caused" by another – can be sufficiently culpable to warrant the death penalty. *Tison*, 481 U.S. at 157. On the other hand, the law recognizes that a defendant's culpability is diminished – though not extinguished – by the wrongful and negligent conduct of others. Youth crime, for example, "is not exclusively the offender's fault," because it also represents "a failure of family, school and the social system." *Eddings*, 455 U.S. at 115 n.11 (internal quotation omitted). Similarly, this Court has held that a person is less culpable when, by his or her very nature, s/he is more "susceptible to influence" by others. *Id.* at 115.

In light of these four principles – all tied to the touchstone of "personal culpability" – the Eighth Amendment requires that individuals with mental retardation, like Mr. Atkins, be excluded as a class from the sanction of death:

1. Individuals with mental retardation do not have the same capacity as others to make reasoned choices. The most fundamental feature of mental retardation is impaired intellectual capacity – specifically, a level of intelligence that places the individual at the very bottom of the population in terms of reasoning ability. This impairment affects the most basic skills, such as fact retention, problem solving, and concentration. It also impedes more abstract thought processes, such as the ability to reason and make logical connections (a process requiring transference of information and generalization skills). AAMR, MENTAL RETARDATION 9, 15, 40; see also Jenkinson, 104 AM. J. MENTAL RETARDATION at 321.

Reasoned choice of a course of action involves many steps: sustaining a certain level of attention; focusing on the relevant and avoiding distraction by the irrelevant; assessing the situation correctly (*e.g.*, understanding language and reading social cues); generating a set of alternative possible responses; choosing among them; and then exercising control to act consistently with that choice. The acquisition of these skills is seldom complete until the end of normal childhood, and such skills will ordinarily remain fragmentary at best in a mentally retarded individual. Jenkinson, 104 AM. J. MENTAL RETARDATION at 321. Moreover, the deficits in language and communication that commonly accompany mental retardation may limit the range of responses that a person has, meaning that a person with mental retardation might not, for example, take the ordinary step of asking for more information in response to a puzzling situation. See AAMR, MENTAL RETARDATION 15; Jenkinson, 104 AM. J. MENTAL RETARDATION at 321. For these and other reasons,

mentally retarded individuals commonly demonstrate rigid thought processes and "exhibit an inflexible pattern of problem-solving," Michael L. Wehmeyer & Kathy Kelchner, *Interpersonal Cognitive Problem-Solving Skills of Individuals with Mental Retardation*, 29 EDUC. & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES 265, 267 (1994), a seeming inability "to realize that similar situations often require similar responses and . . . that dissimilar situations may require different responses." Whitman, 94 AM. J. MENTAL RETARDATION at 348. The death penalty is inappropriate for those who "have [a] reduced capacity for considered choice." *Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Justice Powell, concurring).

2. In addition, individuals with mental retardation are less able to appreciate the consequences of their actions. Appreciating consequences involves several discrete steps: considering alternative possible responses; predicting the consequences of each alternative; evaluating the different consequences (which includes applying abstract standards of principle and values to the predicted consequences); and choosing among the appraised consequences. A mentally retarded individual's decreased ability to reason and understand cause-and-effect impairs his or her ability to take even the simplest of these steps (foreseeing that Y will follow from X, and that Y may cause harm to one or more others, thereby affecting the judgment about X), let alone to follow the more advanced steps or to comprehend the ultimate connection between a harmful act and any resulting punishment. As this Court has noted, "less intelligence" means that an individual "is less able to evaluate the consequences of his or her conduct." *Thompson*, 487 U.S. at 835.

3. Like young children, persons with mental retardation do not possess the requisite levels of maturity and responsibility to make death an appropriate punishment. Because of their impairments in intellectual functioning and their "reduced ability to cope with . . . the everyday

world," *Cleburne*, 473 U.S. at 442, persons with mental retardation do not have the same capacity – "the experience, perspective, and judgment," *Eddings*, 455 U.S. at 116 – to navigate life's stresses. Lacking these tools, they are often unable to "control . . . or modify their . . . impulses effectively," Levy-Shiff, *et al.*, 94 AM. J. MENTAL RETARDATION at 547, and, like juveniles, are "much more apt to be motivated by mere emotion." *Thompson*, 487 U.S. at 835. Because the intellectual impairment of those with mental retardation manifests itself during the developmental period, there is often a "chain reaction," with adaptive problems leading to further adaptive problems, see, *e.g.*, Matson & Fee, *Social Skills Difficulties Among Persons With Mental Retardation*, in HANDBOOK OF MENTAL RETARDATION at 471, resulting in "serious emotional problems," *Eddings*, 455 U.S. at 116, and "arrested emotional development," *Penry I*, 492 U.S. at 324. This cycle traps them in the posture of an "emotionally disturbed . . . [individual] with a disturbed child's immaturity," *Eddings*, 455 U.S. at 116.

As with children, the moral reasoning of individuals with mental retardation is only partially developed: The significantly subaverage intellectual functioning that is a defining characteristic of mental retardation translates into serious impairments of moral understanding. See AAMR, MENTAL RETARDATION 9, 40. Underlying the growth of moral reasoning is not only the ability to learn and retain information, but also the ability to think abstractly instead of concretely. The development of abstract thinking and moral reasoning occurs in adolescence. See, *e.g.*, JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD 27-29, 96-98 (Free Press ed. 1997). When a toddler misbehaves, we respond with concrete commands (*e.g.*, "Don't hit."). We save lower-level abstractions (*e.g.*, "We have a rule against hitting.") for somewhat older children. See *id.* at 27-29, 178-85. A young child might understand the lower-level abstraction that there are things called rules and

they are not to be broken, but will not be able to reason about rules (*e.g.*, "There is a rule against hitting, which is really a rule about not hurting people, so doing other things that hurt people is also off limits."). See *id.* at 27-29, 89, 134. Once moral reasoning has developed, a person can recognize that there are rules, and also principles underlying those rules, embodying values against which rules might be measured. See *id.* at 27-29, 95. Only at this stage of moral development does an individual function as an independent moral being, responding to his or her own developed system of morals, and not merely submitting to the authority of another. See generally *id.* But this stage is beyond what those with mental retardation can achieve. See AAMR, MENTAL RETARDATION 9, 40; see also Jenkinson, 104 AM. J. MENTAL RETARDATION at 321.

4. Finally, persons who have mental retardation do not possess the requisite level of individual culpability to warrant death. Due to their impairments, mentally retarded individuals are "susceptible to influence." *Eddings*, 455 U.S. at 115. More importantly, the intellectual impairment of adults with mental retardation is permanent, immutable, and beyond the individual's control. See *Cleburne*, 473 U.S. at 442. While the adaptive behavior of mentally retarded individuals can improve, *Penry I*, 492 U.S. at 338 – indeed, mentally retarded individuals often do well in structured environments – the possibility for improvement is largely, if not entirely, outside their control. It depends on educational and support services, which their familial, social, and economic circumstances may or may not make possible and actually deliver. From this standpoint, individuals with mental retardation simply do not possess the level of responsibility for their own destiny that is the Eighth Amendment predicate for the punishment of death, a penalty that sums up an individual's life and declares it forfeit.

C. Executing individuals with mental retardation serves no legitimate penal objective

Not only is the death penalty always out of proportion to the culpability of persons with mental retardation, but death for such persons does not – and cannot – comport with the "two principal social purposes [of punishment]: retribution and deterrence of capital crimes by prospective offenders." *Thompson*, 487 U.S. at 836 (internal quotations and citation omitted). As this Court has recognized, the death penalty cannot serve the goals of deterrence if a person cannot reason through the consequences of actions or understand the link between his or her actions and the ordained punishment. See, *e.g.*, *id.* at 837. The inability to imagine and assess competing courses of action is a core aspect of mental retardation. This limitation dramatically reduces the ability of mentally retarded persons to engage in the sort of self-controlled reasoning process that makes deterrence a real constraining force. Nor can removing persons with mental retardation from the universe of those who are subject to execution conceivably reduce any deterrent effect the death penalty may have on the rest of the population. See *Ford*, 477 U.S. at 407.

Similarly, "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison*, 481 U.S. at 149; see also *Ford*, 477 U.S. at 409 ("we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life"). Given the diminished level of personal culpability of defendants with mental retardation, executing them cannot fulfill the goal of retribution. Thus, it "is nothing more than the purposeless and needless imposition of pain and suffering," *Penry I*, 492 U.S. at 335, in violation of the Eighth Amendment.

D. The system of case-by-case determination in capital cases has not protected defendants with mental retardation from improvident death sentences

As experience since *Penry I* has demonstrated, several factors heighten the risk that the death penalty may be imposed on persons with mental retardation despite *Penry*'s assurance that they can plead their disability in mitigation. These factors include (a) the breakdown in procedural protections that results from a defendant's possession of the cognitive and behavioral impairments characteristic of mental retardation; and (b) jurors' lack of experience with, and faulty stereotypes regarding, persons with mental retardation, coupled with the potential for prosecutors to exploit such ignorance or stereotypes. The upshot is an inherently unreasonable "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion). See generally Carol Steiker & Jordan Steiker, *Defending Categorical Exemptions to the Death Penalty: Reflections on the ABA's Resolutions Concerning the Execution of Juveniles and Persons with Mental Retardation*, 61 LAW & CONTEMP. PROBS. 89, 98-104 (Autumn 1998).

Breakdown of procedural protections. The substantial cognitive and behavioral impairments that are at the core of mental retardation severely hamper a retarded defendant at every stage of the criminal process. See generally RONALD W. CONLEY, RUTH LUCKASSON & GEORGE N. BOUTHILET, eds., THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS (1992). These handicaps are so pervasive and so insidious that they undermine confidence that a death sentence imposed on such a defendant was the product of a fair procedure that adequately weighed the mitigating effects of his or her mental retardation. In an alarming number of cases that have

come to light since *Penry I*, even the reliability of the guilty verdict has been put in doubt.

In many cases, these problems begin during the investigative phase, and in particular with the questioning of suspects who have mental retardation. Confessions and inculpatory statements made by mentally disabled suspects are particularly problematic regarding not only their voluntariness, but also their reliability. The propensity of many individuals with mental retardation to do whatever is asked of them by figures of authority has been widely documented in the clinical literature,[36] and this has generated well-founded concern about the process by which confessions are obtained. See, *e.g.*, AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standards 7-5.8 through 7-5.10 (1989), and accompanying Commentary.

Even more pervasive difficulties are encountered in the representation of defendants with mental retardation at trial. The limitations inherent in a defendant's mental retardation can place substantial obstacles in the way of a fair trial.[37] And in many cases, the defendant's limited

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[36] See, *e.g.*, L. W. Heal & C. K. Sigelman, *Response Biases in Interviews of Individuals with Limited Mental Ability*, 39 J. INTELLECTUAL DISABILITY RESEARCH 331 (1995); Carol K. Sigelman, Edward C. Budd, Cynthia L. Spanel & Carol J. Schoenrock, *When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons*, 19 MENTAL RETARDATION 53 (1981).

[37] The relevant limitations are abundantly documented in the clinical literature on mental retardation. They include ***deficits in memory***, see, *e.g.*, CECIL D. MERCER & MARTHA E. SNELL, LEARNING THEORY RESEARCH IN MENTAL RETARDATION 94-141 (1977); James M. Bebko & Helen Luhaorg, *The Development of Strategy Use and Metacognitive Processing in Mental Retardation: Some Sources of Difficulty*, in JACOB A. BURACK, ROBERT M. HODAPP & EDWARD ZIGLER, eds. HANDBOOK OF MENTAL RETARDATION AND DEVELOPMENT 382, 384-95 (1998) (hereafter BURACK HANDBOOK); Richard L. Luftig & Ronald E. Johnson, *Identification and Recall of*

ability to make a meaningful contribution to his or her defense is compounded by an extraordinarily tenacious desire to ensure that no one – including defense counsel – discovers the extent of his or her impairment or even that s/he suffers from mental retardation.[38] This tragically misguided instinct, which occurs in case after case, thwarts counsel's ability to explain, and the jury's opportunity to consider, the significance of a defendant's mental retardation.

Jurors' unfamiliarity. Juries often have difficulty understanding the intellectual and behavioral deficits characterizing a defendant with mental retardation. While the physical immaturity and youthful appearance

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Structurally Important Units in Prose by Mentally Retarded Learners, 86 AM. J. MENTAL DEFICIENCY 495, 501 (1982); ***deficits in receptive and expressive language skills***, see, *e.g.*, Anne E. Fowler, *Language in Mental Retardation: Associations with and Dissociations from General Cognition*, in BURACK HANDBOOK at 290; ***inattention and impulsivity***, see, *e.g.*, Whitman, 94 AM. J. MENTAL RETARDATION at 347; Matson & Fee, *Social Skills Difficulties Among Persons With Mental Retardation*, in HANDBOOK OF MENTAL RETARDATION at 468; and ***problems regarding motivation***, see, *e.g.*, J. Merighi, M. Edison & Edward Zigler, *The Role of Motivational Factors in the Functioning of Mentally Retarded Individuals*, in R. M. HODAPP, J. A. BURACK, & EDWARD ZIGLER, eds., ISSUES IN THE DEVELOPMENTAL APPROACH TO MENTAL RETARDATION 114 (1990); Jenkinson, 104 AM. J. MENTAL RETARDATION at 321-28; Harvey N. Switzky, *Mental Retardation and the Neglected Construct of Motivation*, 32 EDUC. & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITY 194 (1997).

[38] This phenomenon, too, has been fully documented in the clinical literature. See, *e.g.*, JAMES R. DUDLEY, CONFRONTING THE STIGMA IN THEIR LIVES: HELPING PEOPLE WITH A MENTAL RETARDATION LABEL (1997); Judith Cockram, Robert Jackson & Rod Underwood, *People with an Intellectual Disability and the Criminal Justice System: The Family Perspective*, 23 J. INTELLECTUAL & DEVELOPMENTAL DISABILITY 41 (1998); S.E. Szivos & E. Griffiths, *Group Processes in Coming to Terms with a Mentally Retarded Identity*, 28 MENTAL RETARDATION 333 (1990).

of juvenile defendants call attention to their likely emotional immaturity, the limitations on the cognitive and adaptive skills of individuals with mental retardation are hidden behind the façade of an adult physique. Apart from individuals with Down's Syndrome or some similar condition that results in distinctive facial features – rarely encountered in capital cases – mentally retarded defendants cannot be identified by their physical appearance alone. Jurors see someone who looks normal, who is not manifestly "crazy," and they do not grasp the profound yet subtle ways a person with mental retardation is limited in his or her capacity to understand the world and to act appropriately. They see a defendant who is not acting in a visibly "remorseful" fashion in the courtroom and they attribute it to callousness or heartlessness, rather than understanding that a person with mental retardation may have no real comprehension of what is going on.

To make matters worse, defendants with mental retardation often behave in ways that are contextually inappropriate, and this may impair their case at trial and sentencing. Mentally retarded defendants frequently smile where others would display gravity; they fall asleep; they stare at jurors. This inappropriate behavior – which is often intended to mask the defendant's lack of understanding of the courtroom proceedings – can convey a false impression of callousness or lack of remorse. The prosecution can, and often does, use this behavior against the defendant with mental retardation. The prosecution also may exploit defendants' mental retardation by arguing that their pronounced deficit in intelligence makes them more dangerous, and that this is an additional reason to impose the death penalty. See, *e.g.*, *Penry I*, 492 U.S. at 323; Steiker & Steiker, 61 LAW & CONTEMP. PROBS. at 101-02. Prosecutors have no difficulty in exploiting common stereotypes of mentally retarded individuals, characterizing them as "subhuman" and "without self-control." Jurors may be unable to escape the grip of

such prejudicial images when they have had no occasion to encounter people with mental retardation under the circumstances of ordinary living and to overcome the stereotypes that make "the mentally retarded" an unfamiliar, alien, and repellent group.

The unreliability of the process. These various problems combine to produce an unacceptable risk that defendants who have mental retardation and are innocent have been, and will continue to be, sentenced to death. Reports of the recent cases of Earl Washington and Anthony Porter, among others, provide sobering cautionary tales.

In 1983, Earl Washington, who has mental retardation, was arrested in the state of Virginia on a charge of assault. Under interrogation, Washington confessed to the rape and murder of a young woman – as well as to numerous other crimes that police recognized he could not possibly have committed. Notwithstanding many inconsistencies in his statements, Washington was convicted of murder and sentenced to death. In 1994, only days before his scheduled execution, Governor Douglas Wilder commuted his death sentence to life imprisonment because DNA evidence created doubt about Washington's guilt. On October 2, 2000, Governor James Gilmore granted Washington a full pardon, stating that a jury presented with modern DNA evidence "would have reached a different conclusion" in his case despite his confession.[39]

Anthony Porter, an Illinois man with an IQ of 51, was on the verge of being executed in 1998 when his lawyers obtained a stay of execution in order to raise the issue of his competence to be executed (under *Ford*) and the question whether execution of an individual with mental retardation was precluded by the Illinois Constitution.

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[39] See Francis X. Clines, *Virginia Man Is Pardoned in a Murder; DNA Is Cited*, N.Y. Times, Oct. 3, 2000, at A20.

During the period of the stay, conclusive evidence establishing Porter's innocence fortuitously came to light. This incident was a primary factor in Governor George Ryan's decision to institute a moratorium on the execution of death sentences in Illinois.[40]

The arbitrariness of the process. This Court in *Penry I* optimistically assumed that juries would be able to make reliable sorting decisions among defendants with mental retardation, culling the more culpable from those whose disabilities precluded a determination that they were the "worst of the worst," deserving only of death. But the experience of the last decade belies that forecast. Instead, case-by-case administration of the death penalty has turned on factors other than juries' "reasoned *moral* response to the defendant's background, character, and crime." *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (Justice O'Connor, concurring) (internal quotation omitted).

Where there is a grave risk that the death penalty will be meted out irrationally among a particular subclass of capital defendants, not only "in spite of factors which may call for a less severe penalty," *Lockett*, 438 U.S. at 605, but also in ignorance of realities which may cast unperceived doubts upon some defendants' guilt, the exclusion of that category from the pool of constitutionally death-eligible defendants serves a critical "narrowing" function. See *Zant v. Stephens*, 462 U.S. 862, 877-78 (1983); *Arave v. Creech*, 507 U.S. 463, 475-78 (1993). It is also necessary to

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[40] See generally, Eric Zorn, *Questions Persist as Troubled Inmate Faces Electrocution*, Chi. Trib., Sept. 21, 1998, at 1.

While Washington and Porter were sentenced to death before this Court's decision in *Penry I*, the fact that neither man received postconviction relief in the wake of that decision indicates that the capital sentencing processes employed in Virginia and Illinois already comported with the safeguards required by this Court in *Penry I*, and therefore that such procedures did not eliminate the risk of executing an innocent man with mental retardation.

prevent the random and infrequent application of the death penalty within the subclass. Juries do not generally sentence mentally retarded defendants to death when the jurors understand the defendant's disabilities or the moral issue at stake. See note 49 *infra*. They do so fortuitously, largely as a consequence of the difficulties that some retarded defendants and their lawyers have in getting the jurors to see the defendant as s/he is. "[T]he infrequent and haphazard handing out of death sentences by capital juries was a prime factor underlying [the Court's] judgment in *Furman* . . . that the death penalty [when] . . . administered in unguided fashion, was unconstitutional." *Thompson*, 487 U.S. at 831 (citations omitted). Only a categorical rule can avert the demonstrated danger that death is being meted out in such an unconstitutional manner to persons with mental retardation.

II. EXECUTING PERSONS WITH MENTAL RETARDATION OFFENDS "EVOLVING STANDARDS OF DECENCY"

When the Court first considered the constitutionality of executing the mentally retarded in 1989, it concluded that, as of that time, there was insufficient evidence of a national consensus against the execution of persons with mental retardation to justify a constitutional prohibition. See *Penry I*, 492 U.S. at 335. Justice O'Connor recognized, however, that "a national consensus against execution of the mentally retarded may someday emerge reflecting . . . 'evolving standards of decency. . . . ' " *Id.* at 340.

That day has arrived. Much has occurred since this Court decided *Penry I*. The great weight of evidence now demonstrates that American society overwhelmingly opposes the execution of persons with mental retardation, and that this national consensus is shared by nearly every other society in the world.

The emergent national consensus is most immediately evident in the actions of state legislatures, which, the Court

has said, provide "[t]he clearest and most reliable objective evidence of contemporary values." *Penry I*, 492 U.S. at 331. At the time *Penry I* was decided, only two States – Georgia and Maryland – and the federal government had enacted legislation outlawing the imposition of the death penalty on defendants with mental retardation. In little more than a decade, that number of States has grown nine-fold.

The first new enactments came in legislative sessions immediately after the Court's *Penry I* decision called attention to the issue. In 1990, Tennessee and Kentucky implemented legislation banning the execution of persons with mental retardation. Between 1991 and 2000, nine more States – New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, and South Dakota – passed such statutes. (This roster includes both of the States that enacted the death penalty anew after many years without it.) In 2001, no fewer than five States – Arizona, Missouri, Florida, Connecticut, and North Carolina – have enacted statutes to prevent the execution of persons with mental retardation.[41] This brings the current total of States to eighteen,[42] plus the federal

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[41] It was, of course, the enactment of legislation with retrospective effect that led this Court to dismiss the writ in *McCarver v. North Carolina*, No. 00-8727, as improvidently granted. 122 S.Ct. 22 (2001).

[42] 2001 ARIZ. SESS. LAWS 260; ARK. CODE ANN. § 5-4-618 (Michie 1993); COLO. REV. STAT. ANN. § 16-9-403 (West 1993); 2001 Conn. Acts 151 (Reg. Sess.); 2001 Fla. Laws, ch. 202; GA. CODE ANN. § 17-7-131(j) (1988); IND. CODE ANN. § 35-36-9-6 (Michie 1994); KAN. STAT. ANN. § 21-4623 (1994); KY. REV. STAT. ANN. § 532.140 (Banks-Baldwin 1990); MD. ANN. CODE art. 27, § 412(g) (1989); 2001 Mo. Laws 267; NEB. REV. STAT. § 28-105.01 (1998 & Supp. 2000); N.M. STAT. ANN. § 31-20A-2.1 (Michie 1991); N.Y. CRIM. PROC. LAW § 400.27 (McKinney 1995); 2001 N.C. Sess. Laws 346; S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2000); TENN. CODE ANN. § 39-13-203 (1990); WASH. REV. CODE ANN. § 10.95.030(2) (West 1993).

government.[43] When these eighteen States are added to the twelve States that do not have the death penalty,[44] it is evident that the statutes in only a minority of States now allow the possibility of executing an individual with

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[43] Federal Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(1) (1988); Federal Death Penalty Act of 1994, 18 U.S.C. § 3596(c) (1994). (The first of these statutes preceded this Court's decision in *Penry I*, while the second was subsequent to it.)

[44] We recognize that in *dicta* this Court has cast doubt upon the relevance of States that do not have the death penalty when surveying jurisdictions to ascertain whether there is a national consensus regarding a particular capital-sentencing practice. See *Stanford v. Kentucky*, 492 U.S. 361, 370 n.2 (1989). We respectfully suggest that it would be inappropriate to exclude the people of those States from any national consideration of whether it is acceptable to execute an individual with mental retardation. All public opinion polling, both state and national, indicates a broad and widespread national consensus against executing anyone with mental retardation. See, *e.g.*, Dan Parker, *Most Texans Support Death Penalty*, Corpus Christi Caller-Times, March 2, 2001, at A1 (66% oppose consideration of the death penalty for defendants with mental retardation; 17% support). There is no reason to suspect that the people of Maine or Hawaii, for example, share that view less fully than the people of Georgia or Florida. And with regard to this particular issue, there is also some evidence about the sentiment in States without the death penalty in the form of bills in their legislatures proposing reinstatement of the penalty. During recent efforts to restore the death penalty in several States, the proponents of the bills drafted them with explicit provisions that the penalty would not be imposed on individuals with mental retardation. See, *e.g.*, Iowa H.F. 2, 76th Gen. Assem. (1995); Mass. H.B. 4003, 2001 Gen. Court, Reg. Sess. (2001); Minn. H.F. 4136, 81st Leg. Sess. (2000). This is fully consistent with the fact that both of the States that have reinstituted the death penalty since *Penry I*, Kansas and New York, have included provisions to protect defendants with mental retardation.

mental retardation.[45] And on the world-wide stage, the few jurisdictions in the United States that continue to execute mentally retarded persons now stand all but alone.[46]

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[45] It would be erroneous to assume that the people of the twenty States which have not yet enacted a statutory ban on executing individuals with mental retardation *approve* such executions. In two of those States, Texas and Illinois, the legislatures passed bills protecting people with mental retardation but the bills were vetoed by their governors after opponents argued forcefully that the legislation was unnecessary because mentally retarded individuals were not being executed in the State now. See, *e.g.*, Mike Tolson, *A Deadly Distinction Part IV: Death Penalty Reforms Sought*, Houston Chronicle, Feb. 7, 2001, at A1 (" 'We don't execute mentally retarded people,' [Harris County District Attorney Chuck] Rosenthal said."); Veto Message, H.B. 236, *Tex. House J.*, 77th Sess., at 5215 (2001) ("This legislation is not about whether to execute mentally retarded murderers. We do not execute mentally retarded murderers today."). In a third state, Oregon, the legislature passed a bill which was intended to protect people with mental retardation from the death penalty, but because the language of its final version failed to accomplish that goal, it was vetoed by Governor Roberts (at the request of disability advocates). Governor's Message, *Senate J.*, 1st. Legis. Sess., at SJ-218 (Or. 1993) ("The original intent of Senate Bill 640 was to exempt mentally retarded individuals from the death penalty. I wholeheartedly support this goal"). There is no evidence of widespread support for the use of the death penalty in such cases in *any* State.

[46] Among countries that have the death penalty, the practice of executing defendants with mental retardation is essentially unknown in the Twenty-First Century. Recent reports of the information put before this Court in the *McCarver* briefs indicating that only the United States, Japan, and Kyrgyzstan still allowed the execution of persons with mental retardation stimulated a published response by Kyrgyzstan's Ambassador to the United States declaring that such executions are no longer permitted in his country. Baktybek Abdrisaev, *Penalties in Kyrgyzstan*, N.Y. Times, June 30, 2001, at A14 (Letter

These enactments by Congress and the legislatures in State after State accurately reflect the consensus among the American people on this subject.[47] That consensus is also revealed in public opinion polls and in the positions taken by relevant organizations in both the mental retardation and legal fields.[48] Such nonlegislative evidence of the consensus is even more abundant now than it was in 1989.[49]

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to the Editor). And numerous international and regional intergovernmental bodies have passed resolutions and other statements expressing strong opposition to the execution of any individuals who have mental retardation. See *Amicus Curiae* Brief of the European Union in *McCarver v. North Carolina*, No. 00-8727; *Amici Curiae* Brief of Diplomats Morton Abramowitz, *et al.* in *id.*

[47] It is also worth noting that since this Court's decision in *Penry I*, no State has affirmatively legislated that the death penalty *is* appropriately imposed on persons with mental retardation. *Cf. Thompson*, 487 U.S. at 849 (Justice O'Connor, concurring) ("[Where] such a large majority of the state legislatures has unambiguously outlawed capital punishment for 15 year-olds and where no legislature in this country has affirmatively and unequivocally endorsed this practice, strong counterevidence would be required to [demonstrate] that a national consensus against this practice does not exist.").

[48] See, *e.g.*, *Amici Curiae* Brief of American Psychological Association, American Psychiatric Association, and American Academy of Psychiatry and the Law in *McCarver v. North Carolina*, No. 00-8727; *Amici Curiae* Brief of American Association on Mental Retardation *et al.* in *id.*; *Amici Curiae* Brief of American Bar Association in *id.*

[49] In discerning the society's evolving standards of decency, the Court has sometimes considered the conduct of sentencing juries. Analyses of juries' performance in this area are particularly difficult to conduct systematically because juries are not ordinarily required to return special verdicts or specific findings of mitigating circumstances. But the available evidence from social science studies about juror attitudes is fully consistent with the recent legislative developments. See,

Of course, the Court in *Penry I* expressed concern not only about the quantity of the evidence then available but also about its form. In particular, legislation was identified as "an objective indicator of contemporary values upon which we can rely." 492 U.S. at 335. But there can no longer be doubt about whether the public sentiment "may ultimately find expression in legislation." *Id.* The remarkable events of the last dozen years have answered that question.[50]

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e.g., Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1564 (1998) (reporting mental retardation as among the most powerful mitigating factors).

[50] The consensus that has manifested in the last dozen years is also remarkable for the consistency with which it defines the class of people who should be protected from the death penalty. In *Penry I*, the Court speculated that the group of people ineligible for execution at common law might roughly correspond to the more recent subcategories of "severe" or "profound" mental retardation. 492 U.S. at 333. While there may be ambiguity about where the boundary was drawn two centuries ago, there is none regarding the modern consensus: that dichotomy has commended itself to no modern authority. Since *Penry I*, not a single state legislature or foreign jurisdiction addressing the issue of the death penalty has adopted a provision that would treat individuals with "severe" and "profound" mental retardation differently from others who have mental retardation. It should also be noted that the taxonomy of "mild/moderate/severe/profound," which merely restated IQ scores in categorical form, has been abandoned by the American Association on Mental Retardation and replaced with categories that focus more directly on an individual's practical impairment and service needs. AAMR, MENTAL RETARDATION 34.

III. A SENTENCE OF DEATH IS EXCESSIVE AND DISPROPORTIONATE FOR DARYL ATKINS BECAUSE OF HIS MENTAL RETARDATION

Daryl Atkins's IQ of 59 places him in the lowest one percentile of the population for intelligence. (JA 274.) "[L]imited intellect has been a part of Daryl his entire life. . . . " (JA 278.) It is excessive and disproportionate to inflict a sentence of death upon such a person, whose ability to reason and make judgments, to function as a fully mature and responsible adult, is impaired by a disability beyond his control and not of his choosing.

In finding that this death sentence was not excessive and disproportionate, the majority opinion of the Virginia Supreme Court never clearly states its view of Daryl Atkins's mental condition. It says that "the jury . . . heard extensive, but conflicting, testimony from Dr. Nelson and Dr. Samenow regarding Atkins' mental retardation" (JA 620); that "[t]he question of Atkins' mental retardation is a factual one, and as such, it is the function of the factfinder, not this Court, to determine the weight that should be accorded to expert testimony on that issue" (JA 621); but that "[b]ecause Atkins asserts that he cannot be sentenced to death due to his alleged mental retardation, we must consider, as part of our proportionality review, the same evidence heard by the jury regarding Atkins' mental capacity" (JA 621-22). In discussing that evidence, the majority appears to accept the validity of Dr. Nelson's finding, based upon Atkins's WAIS-III test results, that Atkins had a full-scale IQ of 59;[51] it makes no ultimate

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[51] See JA 621: "In conducting the mandated proportionality review and examining the records accumulated pursuant to Code § 17.1-313(E), we do not find a capital murder case in which testimony indicated that a defendant had a full scale IQ as low as 59." It does note that "Dr. Nelson . . . acknowledged that Atkins might have scored two or three points higher if he had not been mildly depressed when Dr. Nelson administered

choice between the conclusions of Dr. Nelson and Dr. Samenow (see JA 617-24), but it seems to say that because Dr. Nelson "never identified an area of significant limitation in Atkins' adaptive functioning other than what he termed Atkins' 'academic failure' " (JA 622-23), the majority was more impressed by Dr. Samenow's conclusion – based upon Atkins's self reported abilities to do laundry and cook chicken – that Atkins showed " 'no lack of ability to adapt' " (JA 623).

The short answer to this is that Dr. Nelson did not "identify" other specific areas in which Atkins's adaptive functioning was deficient because he found and testified that Atkins demonstrated a "lack of success in pretty much every domain of his life" (JA 442), and the prosecution did not cross-examine him on that general finding. Dr. Nelson's report recounted that the information which Dr. Nelson had obtained from family members and school records substantiated that Atkins "could not do his own laundry, [and] rarely was able to cook meals for himself," as well as lacking "other basic life skills that most defendants his age have mastered" (JA 309). Dr. Samenow's contrary conclusions about Atkins's abilities in the laundry room and the kitchen flouted a rudimentary canon of evaluation in possible cases of mental retardation: not to accept the subject's own appraisal of his or her competencies, since these are likely to be inflated.[52] As for the rest

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the test" (JA 618), but those two or three points would not have effected any change in Dr. Nelson's diagnosis or in the location of Atkins's full-scale IQ score as well down into the range universally accepted as characteristic of mental retardation; and the majority opinion does not reflect any other doubts about the 59 IQ score.

[52] "Although interviewing the person with mental retardation can provide some information on present and past abilities, such information should always be corroborated with

of Dr. Samenow's opinions about Atkins, they are simply beyond the pale. Evaluations of mental retardation must be based on a thorough and competent examination, following standard protocols and procedures.[53] Dr. Samenow's rogue approach to evaluating Daryl Atkins[54] does not come close to satisfying that requirement.[55] Justices

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external sources as reliability is questionable. . . . Frequently, people with mental retardation do not have accurate estimations of their abilities and often provide distorted versions of past accomplishments." Caroline Everington & Denis W. Keyes, *Mental Retardation*, 8 THE FORENSIC EXAMINER 31, 34 (1999). See also note 31 *supra*.

[53] "One of the strengths of a standardized test such as the WAIS-III is that it is able to provide scores that represent an individual's performance compared with other individuals of about the same age. However, to obtain results that are comparable to national norms, one must be careful to adhere to the same administration and scoring procedures that were used during the standardization of the test." KAUFMAN & LICHTENBERGER 15. See also, *e.g.*, LEWIS R. AIKEN, ASSESSMENT OF INTELLECTUAL FUNCTIONING 57 (1987); ANNE ANASTASI, PSYCHOLOGICAL TESTING 24 (5th ed. 1982); JERRY J. SWEET, ed., FORENSIC NEUROPSYCHOLOGY: FUNDAMENTALS AND PRACTICE 15 (1999).

[54] See text and notes at notes 27-29 *supra*. Moreover, Dr. Samenow used the very deficits that are typical of people with mental retardation to deny the presence of the disability. He chose to see as volitional, rather than as symptomatic (see note 37 *supra*), Daryl Atkins's lack of understanding of the gravity of the crime, inability to express deep remorse (JA 486-87), lack of motivation, lack of concentration and the specific misbehaviors he exhibited in school (*e.g.*, inattentiveness, tardiness, loitering). (JA 481.)

[55] For example, Dr. Samenow purports to dismiss the overwhelming evidence of Atkins's mental retardation by reporting a few vocabulary words which Dr. Samenow speculates that individuals with mental retardation would not know. *As a general category*, language usage does correlate moderately with general cognitive ability, but proficiency in

Hassell and Koontz, dissenting on this point below, rightly found it altogether unbelievable that "Dr. Samenow, who did not administer a complete IQ test to the defendant and admittedly asked the defendant questions based upon bits and pieces of outdated tests to supposedly evaluate the defendant, would opine that this defendant possesses at least average intelligence." (JA 630-31.)

Nothing about Daryl Atkins was "at least average." His growth throughout childhood was stunted by his

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various language skills can coexist with documented mental retardation. See Deborah L. Coates & Peter M. Vietze, *Cultural Considerations in Assessment, Diagnosis and Intervention*, in AMERICAN PSYCHOLOGICAL ASSOCIATION, MANUAL OF DIAGNOSIS AND PROFESSIONAL PRACTICE IN MENTAL RETARDATION 243, 250 (John W. Jacobson & James A. Mulick eds., 1996). Functional language skills involve several domains, including syntax (the way words are combined in sentences or phrases), morphology (knowledge and use of basic linguistic units), phonology (production of speech sounds), speech acts (use of speech), conversation (speech acts in social context) and discourse (interactive discussion), in addition to lexicon (vocabulary). Catherine E. Snow & Barbara Alexander Pan, *Ways of Analyzing the Spontaneous Speech of Children with Mental Retardation: The Value of Cross-Domain Analyses*, 19 INTERNATIONAL REV. RESEARCH IN MENTAL RETARDATION 163 (1993). Studies indicate that individuals with mental retardation in the range of Mr. Atkins's are likely to have less impairment in the domains of lexicon and speech act and more substantial deficits in the more complex areas of morphology and syntax. *Id.* A preoccupation with vocabulary, even if vocabulary is systematically measured rather than gauged by the kind of idiosyncratic, patchwork observation employed by Dr. Samenow, cannot properly serve as a substitute for full clinical evaluation of mental retardation. See, *e.g.*, James K. Maxwell & Fred Wise, *PPVT IQ Validity in Adults: A Measure of Vocabulary, Not of Intelligence*, 40 J. CLINICAL PSYCHOLOGY 1048 (1984); Barbara B. Fazio, Judith R. Johnston & Laurie Brandl, *Relation Between Mental Age and Vocabulary Development Among Children with Mild Mental Retardation*, 97 AM. J. MENTAL RETARDATION 541 (1993).

inability to learn like other children. His understanding of the world around him was circumscribed by acute disability. Putting such a person to death offends the Eighth Amendment.

CONCLUSION

The judgment of the Virginia Supreme Court should be reversed.

Respectfully submitted,

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Supreme Court of the United States

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

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QUESTIONS PRESENTED

I. GIVEN THAT ATKINS FAILED TO RAISE HIS EIGHTH AMENDMENT CLAIM IN THE VIRGINIA SUPREME COURT AND THE VIRGINIA SUPREME COURT DID NOT DECIDE ANY EIGHTH AMENDMENT ISSUE, DOES THIS COURT HAVE JURISDICTION TO CONSIDER THE CLAIM?

II. DOES THE EIGHTH AMENDMENT PROHIBIT EXECUTION OF THE MENTALLY RETARDED?

III. DOES ATKINS QUALIFY AS A "MENTALLY RETARDED" PERSON?

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STATEMENT OF THE CASE

I. The Crime[1]

At about 11:30 p.m. on August 16, 1996, after spending the day drinking with friends, Daryl Renard Atkins and William Jones walked to a Hampton, Virginia, 7-Eleven store to purchase beer. (JA 40-41, 44-45). Atkins brought with him to the 7-Eleven a gun he had borrowed from a friend, but no money; he was going to "panhandle" for beer money. (JA 45-46).

On his way home from work, Eric Nesbitt, a U.S. Air Force soldier, arrived at the same 7-Eleven at approximately 11:30 p.m. Before Nesbitt entered the 7-Eleven, Atkins spoke to Nesbitt although the two did not know each other. (JA 48-49). Nesbitt entered the store, purchased a snack and then left. As Nesbitt drove his pick-up truck out of the parking lot, Atkins "whistled" at Nesbitt and Nesbitt stopped his truck. (JA 50). Atkins approached the passenger side of the truck and Jones approached the driver's side. Atkins pointed the gun at Nesbitt and told him to "let my friend drive." Atkins and Jones each entered the truck, trapping Nesbitt in the

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[1] Atkins' statement of facts is largely written from the perspectives of two individuals: William Jones and Atkins. Atkins and Jones both testified in the guilt phase and each named the other as the "triggerman" in the murder. By finding Atkins guilty of capital murder, the jury *rejected* Atkins' self-serving testimony and credited the testimony of William Jones that Atkins alone shot and killed Nesbitt because the jury was instructed that only the "triggerman" may be convicted of capital murder. *See* Va. Code § 18.2-18. It is misleading, to say the least, for Atkins to present his statement of facts as if there is some unresolved factual question regarding Atkins' guilt.

middle between them. (JA 51). After Atkins removed sixty dollars from Nesbitt's wallet (JA 166), Jones drove the trio to an area bank where Atkins forced Nesbitt at gunpoint to withdraw $200 using his automatic teller (ATM) card. (JA 58, 167-169).

As they drove away from the bank, Jones suggested that they tie Nesbitt up and leave him someplace so that they "could get away." (JA 61). Nesbitt begged Atkins and Jones "not to hurt him." (JA 61). Atkins told Jones he "knew a place at Yorktown" near his grandfather's house and directed Jones to get on Interstate 64 and drive West toward Williamsburg. (JA 4, 62). After about thirty minutes, Atkins directed Jones to exit the interstate and they proceeded to Tower and Crafford Roads – a remote and deserted area in York County. (JA 62, 64-65, 66).

Atkins got out of the truck and ordered Nesbitt to do the same. (JA 67). Nesbitt had taken "probably two steps" when Atkins began shooting him. (JA 67). Jones tried to get out of the truck but the driver's side door had jammed. Jones "jumped out" the truck window, went around the truck and attempted to wrestle the gun away from Atkins. (JA 67, 68-69, 73). During this struggle, Atkins was shot in his left leg. (JA 69).

Jones was successful in wrestling the gun away from Atkins and the two reentered the pick-up truck. (JA 73-74). Nesbitt lay on the ground dead. (JA 74). Jones and Atkins left Nesbitt's body, and Jones drove Atkins to a hospital, asked Atkins for some money and then, still driving Nesbitt's pick-up truck, checked into a motel. (JA 75-77). When Atkins presented himself for treatment at the hospital, he "calmly" told the duty nurse that he had

been the victim of an attempted robbery directly in front of the hospital and had hopped to the emergency department of the hospital. (JA 23-24). The duty nurse observed no signs that Atkins was intoxicated.[2]

Around 3:45 a.m. on August 17, 1996, Garland Clay was driving home when he discovered Nesbitt's body. (T.T., 2-10-98, pp. 140-141). After Clay phoned the police, Investigator Frederick Lyons responded to the scene and found six shell casings on the ground. (T.T., 2-10-98, p. 192). Lyons also discovered Nesbitt's ATM card, checked with the bank and discovered the $200 withdrawal. (JA 6). He obtained photographs of the transaction (see Lodging to JA at L1-L48) which were distributed to the local media along with a "crime line phone number" for citizens to call. (JA 7, 11). Five citizen callers identified Jones from the photographs and one caller informed the police that Atkins "ran with Jones." (JA 7). The police arrested Atkins on August 21, 1996. (JA 7-8, 11). They found Nesbitt's truck in the parking lot of the motel where Jones had driven after the murder. (JA 9; T.T., 2-11-98, pp. 146-147).

The Medical Examiner determined that Nesbitt had sustained eight separate gunshot wounds to his thorax, chest, abdominal area, arms and legs. (T.T., 2-11-98, p. 83). Many of the bullets had exited and then reentered Nesbitt's body, resulting in eighteen distinct entrance/

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[2] For instance, the nurse testified that she did not detect an odor of alcohol on Atkins, that he "was not waving in his gait, even though he was on one foot . . . [and] [h]is speech was not slurred." (Trial Transcript, hereinafter T.T., 2-11-98, p. 70).

exit wounds. (*Id.* at 86, 88). Three of the gunshots perforated Nesbitt's lungs, heart and aorta, caused massive internal hemorrhaging, and were "lethal." (*Id.* at 86, 88, 96). Two other bullets were found in Nesbitt's abdomen and shoulder.

II. The Trial And First Appeal

Prior to trial, Atkins was examined by Dr. Evan Nelson, a psychologist appointed on his behalf. Nelson concluded that Atkins was mildly mentally retarded, with a full-scale I.Q. of 59.[3] (JA 269). At trial, Nelson admitted that Atkins' I.Q. score may "have been slightly higher if [Atkins] were not mildly depressed" at the time he took the test.[4] (JA 308). Nelson concluded that Atkins fully appreciated the criminality of his conduct and could conform his conduct to the requirements of the law if he so desired and thus was not insane or incompetent at the time of the offense. (JA 289, 290, 309).

Atkins was tried in the York County Circuit Court in February, 1998, for the capital murder of Eric Nesbitt in the commission of robbery while armed with a deadly weapon.[5] In addition to the evidence outlined above, the

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[3] It is undisputed that Atkins, who was twenty at the time of trial, never had been previously diagnosed as mentally retarded.

[4] On direct examination, Nelson admitted also that "certainly" people can fake a lower score on an I.Q. test. (JA 272).

[5] Atkins also was charged with abduction with intent to extort money, robbery, use of a firearm in the commission of abduction and use of a firearm in the commission of robbery.

Commonwealth presented the testimony of Stephen Burton, a cellmate of Atkins. According to Burton, Atkins admitted that he "had put a boy out of a truck in York County [and] that he had shot at the boy." Atkins, however, "wasn't particularly worried about it [because all the Commonwealth] had on him was a picture of him at an ATM machine holding a gun at the boy." (T.T., 2-12-98, pp. 236-237).

Atkins testified articulately on his own behalf, informing the jury that, although he fully participated in the abduction and robbery of Nesbitt, it was William Jones who shot Nesbitt while Atkins waited in the hijacked truck.[6] As noted, the jury rejected Atkins' testimony and found him guilty of premeditated murder in the commission of robbery.

In the separate sentencing proceeding, the Commonwealth presented evidence of Atkins' 25 prior felonies as well as the testimony of several victims of Atkins' prior crimes as proof of Atkins' "future dangerousness." (JA

Prior to trial, Atkins pled guilty to those offenses. (T.T., 2-9-98, pp. 2-15).

[6] DNA and blood evidence from inside the victim's truck established that the murder simply could not have occurred as Atkins testified. According to Atkins, he was shot in his left leg by Jones, and Jones shot Nesbitt while Atkins waited inside the truck on the "passenger side." (JA 172). The passenger seat, however, was covered with *Nesbitt's* projected blood (T.T., 2-11-98, pp. 246-247; T.T., 2-12-98, pp. 27, 57-58, 60) – a fact making Atkins' version an impossibility. In addition, no blood was found on the transmission hump of the truck. (T.T., 2-11-98, pp. 270-271). According to the blood spatter expert, if someone had been shot while sitting inside the truck, "you would expect to see impact spatter." (*Id.*).

220-240, 294-301). The defense presented the testimony of Dr. Nelson, who opined that Atkins was mildly mentally retarded. He suggested that, in a structured prison setting away from alcohol and drugs, Atkins' risk for future violent behavior could decrease. (JA 283-284).

The jury sentenced Atkins to death, finding that he represented a continuing serious threat to society and that his offense was outrageously or wantonly vile, horrible or inhuman in that it involved aggravated battery to the victim. (T.T., 2-14-98, pp. 212-213). In the post-verdict hearing, the trial judge imposed the death sentence. (T.T., 4-28-98, pp. 35-37). The court also sentenced Atkins to two life terms for the robbery and abduction and to five years each on the two firearms offenses. (*Id.*).

The Supreme Court of Virginia affirmed Atkins' convictions but reversed his death sentence, concluding that an improper sentencing verdict form required a remand to the trial court for resentencing on the capital murder conviction. *Atkins v. Commonwealth*, 510 S.E.2d 445 (Va. 1999) (*Atkins I*).

III. The Resentencing

Prior to the start of the resentencing, Atkins was evaluated by another mental health expert, Dr. Robert S. Brown, Jr. (JA 319). Dr. Brown found that Atkins demonstrated a "clear understanding" of the proceedings and the ruling by the Supreme Court of Virginia. (JA 328). At Dr. Brown's urging, Atkins identified several persons as possible mitigation witnesses. (JA 329). Dr. Brown concluded that Atkins had the "ability to learn and remember," possessed "the capacity to understand the legal

proceedings against him," and was "competent to assist his attorneys." (JA 331, 335-336).[7]

At the resentencing, the Commonwealth again presented the evidence surrounding Nesbitt's murder, Atkins' 25 prior felonies and testimony from Atkins' victims. Amanda Hamlin testified that, as she was outside one evening mowing her yard, Atkins "slapped a gun up against [her] face," dragged her off her lawnmower, hit her again with the gun, "put the gun to [her] stomach and shot [her]." (JA 411-412). Dennis Tuninei, Shane Stoops and John Hultquist testified Atkins robbed them at gunpoint as they were using a pay phone and that Atkins had hit Tuninei in his head with a broken bottle. (JA 405-406, 407, 408).

Kevin Phillips testified that, as he was delivering a pizza to a house in Hampton, Virginia, three men approached him, put a gun to his head, forced him to crawl to his car and drove him to a swamp. (JA 409; T.T., 8-19-99, pp. 155-159). On the drive to the swamp, his captors debated whether to kill him. At the swamp, they told him to "lay on the ground . . . and the gun was put in [his] back." (T.T., 8-19-99, p. 158). They then told him to get up and that he "had five seconds to run" before he was killed. (*Id.* at 158-159). Atkins was charged and

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[7] Contrary to Atkins' assertion at note 6 of his brief that he "had failed driver's education twice," Atkins reported to Dr. Brown that he did not possess a valid driver's license and *never had attempted to obtain one*. When asked why, Atkins told Brown that he chose to use the bus system as his primary mode of transportation. (JA 325).

convicted of abduction, use of a firearm and robbery arising out of this incident. (JA 569).

Atkins again presented the testimony of Dr. Evan Nelson. Nelson again opined that Atkins' I.Q. was 59, placing him in the mildly mentally retarded range. (JA 438). Nelson's opinion, again, mostly was based on Atkins' recently obtained I.Q. score of 59. (JA 438-439, 611). Nelson again explained that Atkins could have "scored a little higher" on the I.Q. test if he had not been mildly depressed at the time he took the test and that, in a structured prison setting away from alcohol and drugs, Atkins' risk for future violent behavior could decrease.

In rebuttal, Dr. Stanton E. Samenow disagreed with Nelson, opining that Atkins was of average intelligence and not mentally retarded. (JA 476). Dr. Samenow testified that, according to the leading text on mental disorders, the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (DSM-IV),[8] there are, besides age, two criteria for a diagnosis of mental retardation: significant subaverage intellectual functioning and concurrent impairments in adaptive functioning. Regarding Atkins' adaptive functioning, Samenow stated:

> [Atkins] told me he was able to wash his clothes, wash and dry his clothes, he used his parents' washing machine and dryer. He told me – when I asked him if he was able to cook, he gave me his recipe for cooking chicken.

[8] The DSM-IV has been updated by the DSM-IV-TR (text revision). The criteria for mental retardation, however, remain the same.

> This Defendant . . . lived a life in which he didn't work, and I don't mean just didn't hold a job, that he didn't do, but then again there are a lot of 18-year-olds who maybe haven't worked because they've been in school. But he didn't work in school either.
>
> So the point is he chose a certain – to live a certain way of life, and *there was no lack of ability to adapt and to take care of basic needs, certainly.*[9]

(JA 483-484) (emphasis added).

At the conclusion of the evidence and with Atkins' agreement, the jury was instructed as follows:

> The Court instructs the jury that if you find that the Commonwealth has proved beyond a reasonable doubt the existence of an aggravating circumstance, in determining the appropriate punishment you should consider any evidence presented in mitigation and/or of circumstances which do not justify or excuse the evidence but which, in fairness or mercy, may extenuate or reduce the degree of moral culpability and punishment which tends to make life imprisonment

[9] Samenow noted that Atkins used "sophisticated" words with the proper tenses during their conversations, could make change, had a good grasp of history and did better on the intelligence tests if "pushed just a little." Samenow concluded that, in school, Atkins "was a person who chose to pay attention sometimes, not to pay attention others, and did poorly because he did not want to do what he was required to do." (JA 481).

without possibility of parole a more appropriate punishment than death.

(T.T., 8-19-99, p. 97).[10]

Atkins argued to the jury that his mild mental retardation made him less culpable, that "Virginia State law has mandated mental retardation as a valid mitigating factor," and urged the jury to sentence him to life without the possibility of parole. (*Id.* at 113). The jury sentenced Atkins to death, finding that he represented a continuing serious threat to society and that his offense was outrageously or wantonly vile, horrible or inhuman in that it involved aggravated battery to the victim. (*Id.* at 128). In the post-verdict hearing, the trial judge imposed the death sentence. (T.T., 10-26-99, pp. 3-15). Atkins never made any motion or argument to the resentencing court that his execution was unconstitutional because of his purported 59 I.Q.

IV. The Second Appeal

On March 7, 2000, Atkins filed the assignments of error "upon which he intended to rely for reversal of his conviction." *See* Rule 5:22, *Rules of the Supreme Court of Virginia*. Atkins listed no assignment of error that it was unconstitutional to execute the mentally retarded (JA 601-604); neither did he make any such claim in his opening brief. Instead, he argued that his sentence was

[10] Atkins proffered, but later expressly withdrew, a request for an instruction which specifically told the jury that mental retardation "should" be considered a mitigating factor. (T.T., 8-19-99, p. 68).

disproportionate under Virginia Code § 17.1-313 because he was "unable to find a case in Virginia in which an individual with an IQ of 59 has been sentenced to death." Expressly noting the "conflicting evidence" on the question of whether Atkins was mentally retarded, the Virginia Supreme Court rejected his proportionality challenge – as well as his other claims of error – and affirmed Atkins' death sentence. *Atkins v. Commonwealth*, 534 S.E.2d 312 (Va. 2000) (*Atkins II*). In his petition for rehearing, Atkins made no argument that his death sentence was unconstitutional because of his alleged I.Q. On November 3, 2000, the Supreme Court of Virginia denied the petition for rehearing in an unpublished order.

SUMMARY OF THE ARGUMENT

It should be a rare event for this Court, under the Eighth Amendment, to impose a permanent prohibition upon a State's ability to punish an entire class of offenders with the death penalty, especially when no Eighth Amendment claim ever was presented to the state court. However, even putting aside the issue of this Court's jurisdiction, such a decision by this Court requires a "national consensus so broad, so clear and so enduring," *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989), as to be beyond all legitimate question.

In the case of mentally retarded offenders, this Court *already* has decided that such a sweeping prohibition is not required under the Eighth Amendment because execution of the mentally retarded is not cruel and unusual. *Penry v. Lynaugh*, 492 U.S. 302 (1989). In categorically

rejecting the argument that it is cruel and unusual to execute the mentally retarded, this Court concluded that execution of the mentally retarded was not prohibited by the Eighth Amendment at the time the Bill of Rights was adopted, did not contravene the "evolving" standards of decency that mark the progress of a maturing society, and, because of the "heterogeneous" nature of the retarded population, execution of the mentally retarded could not be said to make no measurable contribution to the valid penological goals of deterrence and retribution. Over twelve years later, the same still holds true: society's legitimate interests in deterrence and retribution are served by the execution of mentally retarded offenders who have the ability to plan and carry out a capital murder, and such executions do not contravene the "evolving" standards of decency.

Just as in 1989, moreover, mentally retarded persons today do not "inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." *Penry*, 492 U.S. at 338. Objective evidence supplied by the judgments of state legislatures, moreover, establishes that, just as in 1989, there is no "national consensus" today against execution of the mentally retarded. A full twenty-nine of the thirty-eight States which authorize the death penalty permit it to be imposed on at least some, if not all, mentally retarded capital murderers. Society has not clearly "set its face against" such punishment, *Stanford*, 492 U.S. at 378, and, thus, it cannot be said to be cruel and unusual.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION TO CONSIDER ATKINS' EIGHTH AMENDMENT CLAIM.

The entire record below, including the brief filed by Atkins and the lower court's full opinion, makes clear that the issue the court below was asked to decide was whether a death sentence in Atkins' case was disproportionate to sentences in other similar Virginia cases, a fundamentally different question from the issue of whether the Eighth Amendment categorically prohibits execution of the mentally retarded. Atkins' claim thus may not now be considered. *See Hill v. California*, 401 U.S. 797, 805 (1971) (a federal claim cannot be considered by the Court unless it either has been raised in the state court or considered and resolved by the state court).[11]

In his response to the Commonwealth's motion to dismiss, Atkins contended that the Commonwealth had conceded below that Atkins properly raised the Eighth Amendment claim. Whether or not the Commonwealth made such a concession, however, is irrelevant to a determination of this Court's subject matter jurisdiction

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[11] After certiorari was granted, the Commonwealth filed a motion to dismiss the writ as improvidently granted. The Commonwealth contended that although Atkins had raised on direct appeal his mental retardation in conjunction with his state law claim that his death sentence was disproportionate to other Virginia cases, he never had raised a free-standing claim that under the Eighth Amendment it was cruel and unusual to execute the mentally retarded. Atkins filed a response and on October 29, 2001, this Court *summarily* denied the motion to dismiss.

because jurisdiction cannot be conferred onto this Court by consent or default. *See Sochor v. Florida*, 504 U.S. 527, 535 n.* (1992). *See also Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 622 (1996) ("[W]e are not bound to decide a matter of constitutional law based upon a concession by the particular party before the Court as to the proper legal characterization of the facts.").

The "opinion[ ] of the lower court[ ], and the parties' briefs in [that court] did not squarely isolate, and address [the Eighth Amendment claim]." *Colorado Republican Campaign Committee*, 518 U.S. at 624. In fact, it was only on appeal below and only in conjunction with his assertion that his sentence was disproportionate under Virginia Code § 17.1-313 that Atkins even mentioned his alleged mental retardation. (JA 601). Atkins now implicitly concedes the point when he repeatedly acknowledges that the Supreme Court of Virginia discussed his alleged mental retardation *solely in conjunction with its proportionality review*. (*See* Atkins Br. at 46: "In finding that his death sentence was not excessive and disproportionate, the majority of the Virginia Supreme Court never clearly states its view of Daryl Atkins's mental condition;" *id.* at 46-47: in conducting its proportionality review, "the majority makes no ultimate choice between the conclusions of Dr. Nelson and Dr. Samenow."[12]).

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[12] Of course, the reason the state court did not "state its view of [ ]Atkins's mental condition," is because it had before it no Eighth Amendment issue that required a determination of the defendant's intelligence level. *See Commonwealth v. Harley*, 504 S.E.2d 852, 854 (Va. 1998) (Virginia Supreme Court "traditionally declines" to render advisory opinions).

Indeed, in the court below, Atkins conceded that, under current law, the Eighth Amendment does not prohibit execution of the mentally retarded, and, most importantly, *never argued, as he does now, that that current law should be overturned*. (*See* App. to Pet. for Writ of Cert. at 131). Atkins' argument below never mentioned any federal constitutional error and the Virginia Supreme Court, as Atkins now acknowledges, specifically and solely considered only what it was asked to consider: whether Atkins' alleged mental retardation rendered his sentence disproportionate under § 17.1-313(C) to other capital cases in Virginia:

> Thus, considering "both the crime and the defendant," Code § 17.1-313(C), and the record before us, we cannot say that Atkins' sentence of death is excessive or disproportionate to sentences generally imposed in this Commonwealth for capital murders comparable to Atkins' murder of Nesbitt. We are not willing to commute Atkins' sentence of death to life imprisonment merely because of his IQ score. Dr. Nelson and Dr. Samenow agreed that an IQ score is not the sole definitive measure of mental retardation. Both experts also testified that Atkins was able to appreciate the criminality of his conduct and understood that it was wrong to shoot Nesbitt.
>
> Accordingly, we perceive no reason to commute Atkins' sentence of death and will affirm the judgment of the circuit court.

Atkins II, 534 S.E.2d at 321.[13] Again, the court never decided the Eighth Amendment issue because it never

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[13] Justice Hassell's dissenting opinion below makes expressly clear that the Court was *not* deciding any federal issue:

was asked to do so.[14] Accordingly, this Court has no jurisdiction to consider it. *See Michigan v. Long*, 463 U.S. 1032, 1039 (1983); *Yee v. Escondido*, 503 U.S. 519, 533 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-220 (1983); Sup. Ct. R. 14.1(g)(i).[15]

I recognize that the United States Supreme Court has held that the imposition of the death penalty upon mentally retarded criminal defendants does not violate the Eighth Amendment to the United States Constitution. *See Penry v. Lynaugh*, 492 U.S. 302, 340 (1989). However, *the issue in this appeal is not whether the imposition of capital punishment upon a mentally retarded defendant violates the federal Constitution.* Rather, the issue in this appeal is whether under Code § 17.1-313 the imposition of the sentence of death is excessive or disproportionate to the penalty imposed in similar crimes, considering both the crime and the defendant.

Atkins II, 534 S.E.2d at 324 (emphasis added).

[14] Atkins argued to the jury, as was his right under Virginia Code § 19.2-264.4(B)(vi) and *Penry*, that his alleged mental retardation *mitigated* against a death sentence, but he made no motion or argument before, during or after his trial or sentencing that his alleged mental retardation *prohibited* imposition of the death penalty, much less that the Eighth Amendment forbade it. Had Atkins assigned the Eighth Amendment claim as an error and argued it on direct appeal, there is no doubt that the Supreme Court of Virginia would have applied its contemporaneous objection rule, Rule 5:25, to bar consideration of the claim because Atkins *never raised it in the trial court.*

[15] *See also Beck v. Washington*, 369 U.S. 541, 553 (1962) (noting that jurisdiction is not proper where error is not assigned to the issue and the matter is not briefed in the state court).

II. THE EIGHTH AMENDMENT DOES NOT PROHIBIT EXECUTION OF THE MENTALLY RETARDED.

In *Penry v. Lynaugh*, 492 U.S. 302 (1989), this Court considered and rejected the notion that the Eighth Amendment categorically prohibits the execution of mentally retarded capital murderers. The Court explained that execution of the mentally retarded was not prohibited by the Eighth Amendment at the time the Bill of Rights was adopted. *Penry*, 492 U.S. at 331-333. And, in keeping with settled Eighth Amendment jurisprudence, *see Trop v. Dulles*, 356 U.S. 86, 101 (1958), the Court concluded that execution of the mentally retarded did not contravene the "evolving standards of decency that mark the progress of a maturing society." Noting that only one State had passed legislation barring such executions in 1989, the Court held that "while a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society,' there is insufficient evidence of such a consensus today." *Penry*, 492 U.S. at 340. The Court expressly relied upon the "heterogeneous" nature of the retarded population in rejecting Penry's argument that imposition of the death penalty on the mentally retarded allegedly made no measurable contribution to the penological goals of deterrence and retribution.

Atkins insists that, despite this Court's opinion in *Penry*, execution of the mentally retarded contravenes the Eighth Amendment because it does not measurably contribute to the penological goals of deterrence and retribution. He argues also that, in the twelve years since *Penry*

was decided, a national consensus has emerged against the execution of mentally retarded persons because seventeen additional States have enacted legislation regarding the execution of capital defendants who are mentally retarded.

Clearly though, the mentally retarded are still a "heterogeneous" group with "diverse capacities and life experiences," *Penry*, 492 U.S. at 338; thus the penological goals of deterrence and retribution still are served by imposition of the death penalty on some individuals who happen to be mentally retarded. Moreover, Atkins' methodology of "State-counting" is severely flawed and does not support his bid for a new, sweeping rule of constitutional law dictating that the mentally retarded may not be punished by death for a capital crime. No national consensus exists today against the execution of capital defendants who are mentally retarded but who, like Atkins, have the mental capacity to plan, premeditate and deliberate with a specific intent to kill, understand the proceedings against them, are able to assist in their own defense and know the difference between right and wrong.[16]

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[16] The Court recognized in *Penry* that the common law prohibition against punishing "idiots" for their crimes might make it cruel and unusual to execute profoundly or severely retarded persons who lack the capacity to appreciate the wrongfulness of their conduct. The Court also recognized, however, that because of "the protections afforded by the insanity defense" and *Ford v. Wainwright*, 477 U.S. 399 (1986), the profoundly and severely mentally retarded were not likely to be convicted or face the prospect of punishment. *Penry*, 492 U.S. at 333. The protections of the insanity defense and of *Ford* still are in place and are complemented by the rule announced in *Penry*: a jury must be allowed to consider a capital defendant's mental retardation as mitigating evidence. *Id.* at 328. Unquestionably, the Court's observation in 1989 that the profoundly and severely mentally retarded are unlikely to be convicted or sentenced, still is true and, just as in *Penry*, "such a case is not before [the Court] today." It is unchallenged that Atkins, like Penry, is neither profoundly nor severely retarded and was found competent to stand trial and competent at the time of the offense.

A. Mentally Retarded Capital Murderers Are Distinct Individuals Whose Culpability And Eligibility For The Death Penalty Are Assessed Best On A Case-By-Case Basis.

The mentally retarded are not an homogeneous category of easily interchangeable persons. They are not "all cut from the same pattern . . . they range from those whose disability is not immediately evident to those who must be constantly cared for." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985). Indeed, the leading clinical text, the American Psychiatric Association's *Diagnostic And Statistical Manual Of Mental Disorders* (Text Revision, 4th ed., 2000) ("DSM-IV-TR") divides the mentally retarded into four distinct categories: mildly mentally retarded, moderately mentally retarded, severely mentally retarded and profoundly mentally retarded. The overwhelming majority of mentally retarded persons – a full 85% – fall into the "mild" category. *See* DSM-IV-TR at 43; *Penry*, 492 U.S. at 333. Many of these mildly mentally retarded individuals are high functioning persons. Such persons, if they commit capital crimes, "clearly act with the level of culpability associated with the death penalty."

Penry, 492 U.S. at 339. Thus, "an individualized determination whether 'death is the appropriate punishment' " can and should continue to "be made in each particular case." *Id.* at 310.

1. The mentally retarded are not a homogenous group.

Atkins improperly "regard[s] those on the retarded side of the fence as a homogenous group of organisms defective in all spheres of functioning and forever separated by their very nature from all persons possessing higher I.Q.'s." Edward Zigler, *Personality Development in Individuals with Mental Retardation, in The Individual With Mental Retardation As A Whole Person* 14 (1999) (*Whole Person*); (Atkins Br. at 22-26, 28-32). That argument, however, previously has been presented to this Court and properly rejected. *Penry*, 492 U.S. at 338 ("some [mentally retarded individuals] are fully capable of learning, working and living in their communities.").[17]

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[17] In support of his "homogeneity" argument, Atkins depends almost exclusively on the definition of mental retardation which was adopted by the American Association on Mental Retardation (AAMR) after *Penry*. *See* AAMR, *Mental Retardation: Definition, Classification, And Systems Of Support* (9th ed., 1992); (Atkins' Br. at 22-23, 24, 25). The AAMR's definition of mental retardation, however, altogether disregards the subclassifications in the DSM-IV-TR and has been criticized heavily. *See, e.g.*, Stephen Greenspan, *Dead Manual Walking? Why the 1992 AAMR Definition Needs Redoing*, 32(3) Education & Training In Mental Retardation & Developmental Disabilities 179-190 (1997) (discussing problems in process of developing the definition which contributed to final flawed product); Frank M. Gresham et al., *Critical Analysis of the 1992 AAMR Definition: Implications for School Psychology*, 10(1) School Psychology Quarterly 1-19 (1995) (discussing several challenges the new definition presents to school psychologists in assessing and classifying intelligence, adaptive behavior, and intensities of needed supports); Johnny L. Matson, *Comments on Gresham, MacMillan, & Siperstein's Paper "Critical Analysis of the 1992 AAMR Definition: Implications for School Psychology"*, 10(1) School Psychology Quarterly 20-23 (1995) (acknowledging that the AAMR apparently has abandoned a pragmatic/scientific definition in favor of one that is primarily political and which espouses the "rights" philosophy which has become prominent in the general field of developmental disabilities and noting that the approach of the AAMR appears to be antithetical to science and may promote more inaccuracies in diagnosis). In addition, individuals with mild mental retardation are not well represented in the AAMR's definitions, and there is a mismatch between the AAMR's own definition of mental retardation and the domains measured by the AAMR adaptive behavior scale. *See, e.g.*, Terry Stinnett, *"AAMR Adaptive Behavior Scale-School": Test Review*, 15(4) Journal Of Psychoeducational Assessment 361-372 (1997); *Construct Validity of the AAMR Adaptive Behavior Scale-School 2*, 28(1) School Psychology Review 31-43 (1999).

Every retarded person "has a personality – a complex array of motivational and emotional features that permeate his or her everyday functioning." *Whole Person* at 8; *see Penry*, 492 U.S. at 338 (noting that "[m]entally retarded persons are individuals whose abilities and experiences can vary greatly."). Since this Court decided *Penry*, nothing has changed: it is equally true today that while differing in cognitive functioning from the nonretarded, the mentally retarded have not somehow forfeited their individuality but still are a diverse class of "whole" persons, each with their own individual strengths and weaknesses. *Whole Person* at 8-9, 12.

The practical individualism of mentally retarded persons still is acknowledged by the American Psychiatric Association. As noted, mentally retarded individuals still are classified as mildly, moderately, severely or profoundly retarded. These classifications reflect the level of the person's intellectual impairments and social/adaptive functioning. DSM-IV-TR at 42; *Penry*, 492 U.S. at 308 n.1; *accord* Brief for amici *American Psychological Association, et al.* (APA) at 6, n.3 (acknowledging that individuals with mental retardation have varying skills, and noting the four subclassifications in the DSM-IV-TR).

Persons with mild mental retardation constitute the largest segment (about 85%) of those with mental retardation. According to the DSM-IV-TR:

> As a group, [mildly mentally retarded] people typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth-grade level. During their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.

DSM-IV-TR at 43.

Clearly, high functioning individuals exist within the group of individuals with mild mental retardation. This is due, in part, to the fact that the level of functioning obtained by persons with mild mental retardation often improves over time. Indeed, it is the position of the American Psychiatric Association that "mental retardation is not necessarily a lifelong disorder." *See* DSM-IV-TR at 47 ("Individuals who had Mild Mental Retardation earlier in their lives manifested by failure in academic learning tasks may, with appropriate training and opportunities, develop good adaptive skills in other domains and may no longer have the level of impairment required for a diagnosis of Mental Retardation."). *See also* Kevin S. Mcgrew et al., *Relationship Between Measures of Adaptive Functioning & Community Adjustment for Adults with Mental Retardation*, 58(6) Exceptional Children 517-529 (1992) (investigating relation between measures of adaptive/maladaptive behavior and community adjustment in 239 adults with mild to severe mental retardation and noting their successful integration in community as defined by economic independence, independence in daytime activities and living arrangements, and independence from community support systems); James R. Patton et al., *Individuals with Mild Mental Retardation: Postsecondary Outcomes & Implications for Educational Policy*, 31(2) Education & Training In Mental Retardation & Developmental Disabilities 75-85 (1996) (discussing four important outcomes for students with mild mental retardation: successful employment, development of independence, acquisition of life skills, and successful involvement with school and community); Robert H. Bruininks et al., *Adaptive Behavior & Mental Retardation*, 21 Journal Of Special Education

69-88 (1987) (reviewing construct of adaptive behavior and examining role of community environmental factors in adaptive functioning of mentally retarded persons); Samuel F. Redding, *Life Adjustment Patterns of Retarded & Nonretarded Low Functioning Students*, 45 Exceptional Children 367-68 (1979) (comparing life adjustment of 20 mildly mentally retarded adults and 20 low-functioning students 3-5 years after both groups had graduated from high school and finding that employment status and life adjustment of the mildly mentally retarded subjects were impressive when contrasted with earlier notions about the gross inadequacies of the mentally retarded); Robert B. Edgerton, *Retarded People of Adult Years*, 19(4) Psychiatric Annals 205-09 (1989) (noting that most mentally retarded persons can achieve a semi-independent life if given sufficient time to learn coping skills and if they have support of other persons); Andrea G. Zetlin et al., *Adaptation through the Life Span, in Handbook Of Mental Retardation & Development* (Jacob A. Burack et al. eds., 1998).

Moreover, these high functioning individuals are adults, not children. They hold jobs, own houses, and live in stable co-habitation. *See, e.g.*, B. Maughan, et al., *Mild Mental Retardation: Psychosocial Functioning in Adulthood*, 29 Psychological Medicine 351-366 (1999). It is both inaccurate and demeaning to these adults (and antithetical to the professed goals of the AAMR and other groups working with the mentally retarded) to equate them with children or automatically describe those few of their number who commit aggravated murders as too immature, incapable of moral understanding and lacking in individual culpability to be eligible for the punishment of

death. *See* AAMR, *Mental Retardation Defined And Explained: Definition, Classification & Systems Of Support* 7 (1992) ("Virtually all persons with mental retardation will improve in their functioning as a result of effective supports and services. This improvement will enable them to be more independent, productive, and integrated into their community."). Indeed, even Atkins' amici agree that "[i]t is increasingly accepted that people with mental retardation can be productive, contributing citizens of their communities, and that their integration into those communities should be a goal of governmental policies." Brief for amici *AAMR et al.* at 20.

2. The mentally retarded are entitled to be assessed and judged on an individual basis.

Because no two mentally retarded capital defendants are alike, their individual culpability and eligibility for the death penalty should continue to be assessed on a case-by-case basis. An individualized sentencing determination is the bedrock of the Eighth Amendment. *Jurek v. Texas*, 428 U.S. 262 (1976). "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

Mentally retarded capital defendants who proceed to sentencing mostly are in the mildly mentally retarded

subclass. *Penry*, 492 U.S. at 333.[18] They generally have been found to have the ability to assist their lawyers and to have a rational and factual understanding of the proceedings against them. In keeping with this Court's Eighth Amendment jurisprudence, as well as the professed goals of the AAMR and other similar groups, mentally retarded capital defendants are entitled to be judged *individually*.

Society's legitimate goals of deterrence and retribution likewise are served by such individual judgment. Just as "[i]t is rational" to conclude that some 16-year-olds are adequately deserving of, or significantly deterred by, imposition of the death penalty, *Stanford*, 492 U.S. at 378, so too it is rational to conclude that some mentally retarded persons are adequately deserving of, or significantly deterred by, imposition of the death penalty. In fact, the goal of deterrence is best served if the capital defendant can appreciate the consequences of his actions and understand the link between his actions and the punishment. *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988). Even Atkins does not contend that the intellectual impairments suffered by retarded persons always render them unable to appreciate the criminality of their actions or understand the nature of their punishment and why they are to suffer it. (Atkins Br. at 33: "the intellectual impairments suffered by mentally retarded persons *'dramatically reduce'* their ability to engage in the sort of reasoning process that is a necessary precondition" to

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[18] As noted earlier, a profoundly or severely retarded individual is not likely to be convicted or face the prospect of punishment. *See* note 14, *supra*.

deterrence). Atkins' own case underscores the point: during his psychiatric evaluation prior to resentencing, he indicated that he understood the jury was limited under Virginia law to sentencing him either to life or death for his murder of Eric Nesbitt and he further indicated that he "hoped" for a life sentence from the jury. (JA 330). Atkins thus clearly appreciated the criminality of his actions, the nature of the punishments and why he was to be punished.

Likewise, "the heart of the retribution rationale is that a criminal sentence must directly be related to the personal culpability of the criminal offender." *Tison v. Arizona*, 481 U.S. 137, 149 (1987). Regarding the mentally retarded, this Court has stated: "[i]n light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said . . . that all mentally retarded people, by definition, can never act within the level of culpability associated with the death penalty." *Penry*, 492 U.S. at 338-339. Nothing has changed since the decision in *Penry*: retarded persons still lead varied existences and still are categorized by the leading text in the field as ranging from mildly mentally retarded to profoundly mentally retarded. Thus, the retarded, especially the mildly mentally retarded, still possess the "level of culpability associated with the death penalty." *Id.*

3. Constitutional and statutory safeguards currently in place adequately protect the interests of mentally retarded capital defendants.

Atkins argues that a blanket proscription against execution of the mentally retarded is necessary because "experience since *Penry I* has demonstrated" that the mentally retarded are at risk for a death sentence despite "*Penry*'s assurance that the mentally retarded can plead their disability in mitigation." (Atkins Br. at 34). Atkins misunderstands the critical holding of *Penry*. *Penry* did not hold that capital murderers who pled "their disability in mitigation" constitutionally are exempt from the death penalty. *Penry* merely held that, under the Eighth Amendment, juries must be able to consider any mitigating evidence relevant to a defendant's background and character, including evidence of mental retardation. *Penry*, 492 U.S. at 329. Thus, it is permissible under *Penry* for juries to sentence to death mentally retarded persons as long as the defendant is given the opportunity to present, and the jury to consider, the defendant's mental retardation as mitigating evidence.

Atkins misses the point when he argues that the "procedural protections" afforded to all criminal defendants somehow "breakdown" when the defendant is mentally retarded. (Atkins Br. at 34).[19] Atkins' argument

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[19] Atkins asserts that this "breakdown" in the process is "compounded by the well-known and extraordinarily tenacious desire" on the part of the mentally retarded individual that no one learn of his impairment. (Atkins Br. at 36). Atkins, however, told Dr. Brown prior to his resentencing that he had no objection

fails to acknowledge the fact that capital defendants who claim to be mentally retarded are protected by a criminal justice system offering a multitude of opportunities to raise the defense. In Virginia, a mentally retarded capital defendant must be competent to stand trial. In other words, it must be clear that he has the "substantial capacity to understand the proceedings against him and to assist his attorney in his own defense." *See* Va. Code § 19.2-169.1. At the guilt phase of trial, the defendant may present evidence of mental disease or defect to support a defense of not guilty by means of insanity at the time of the offense. *See* Va. Code § 19.2-169.5. The Commonwealth must prove beyond a reasonable doubt that a mentally retarded capital defendant acted with premeditation and deliberation. *See* Va. Code § 18.2-31 (defining capital murder as "willful, deliberate and premeditated killing. . . . "). At sentencing, the Commonwealth must prove beyond a reasonable doubt either that the mentally retarded capital murderer will be a danger in the future or that his crime was vile. *See* Va. Code § 19.2-264.4. Additionally, a mentally retarded capital murderer must be sane at the time of his execution, *i.e.*, he must know that he is sentenced to death and he must understand why he is sentenced to death. *See Ford*, 477 U.S. at 422.

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to the jury knowing about his mild mental retardation, "if it would help." (JA 329). Atkins also asserts that this purported "breakdown" in the process leads the mentally retarded to falsely confess and sometimes to conviction of the innocent. (Atkins Br. at 35). But, Atkins' own confession belies this assertion: Atkins did *not* confess to the murder of Eric Nesbitt but instead named his co-defendant, William Jones as the triggerman in Nesbitt's murder.

Mentally retarded capital defendants, moreover, are entitled to present evidence of, and instruct the jury that, their mental retardation is a factor mitigating against a death sentence. *Penry*, 492 U.S. at 327-328. Mental retardation is a statutorily enumerated mitigating factor in Virginia. Va. Code § 19.2-264.4(B)(vi). Mentally retarded capital defendants constitutionally are entitled to competent lawyers to represent them and, in the majority of cases, experienced mental health experts to investigate and evaluate their individual circumstances and backgrounds and to advocate on their behalf. *See Ake v. Oklahoma*, 470 U.S. 68 (1985); *see also* Va. Code § 19.2-264.3:1 (giving every indigent capital murder defendant in Virginia the unqualified right to such expert upon request). And a capital murderer who is sentenced to death may raise the issue of his mental retardation as a reason to extend mercy and for commutation of sentence and/or a full pardon in a petition for clemency addressed to the Governor.[20]

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[20] Atkins asserts that juries "often have difficulty understanding the intellectual and behavioral deficits characterizing a defendant with mental retardation." (Atkins Br. at 36). Atkins ignores the fact that there are numerous mental health experts willing and able to explain fully the mentally retarded defendant to a jury and that in the majority of instances, these experts are appointed to assist the defendant *free of charge* and are often of the defendant's own choosing. Amicus APA dismisses juries as "incapable of understanding sentencing instructions[.]" (Br. for amicus APA at 10 n.12). Jurors, of course, need not be specially trained psychologists in order to understand that a capital defendant's mental retardation is a fact that they can consider in mitigation.

Atkins asserts that time has shown that juries are not able to make "reliable sorting decisions among defendants with mental retardation" and juries have not "culled the more culpable from those whose disabilities [should] preclude a sentence of death." (Atkins Br. at 39). Not surprisingly, Atkins *has not cited a single case* in which a jury imposed a death sentence on a mentally retarded capital murderer who acted "without the level of culpability associated with the death penalty." *Penry*, 492 U.S. at 338.

Juries and courts, moreover, indisputably are capable of considering and giving full effect to "mitigating evidence of mental retardation in imposing sentence," *Penry*, 492 U.S. at 340, and distinguishing individuals with mild mental retardation from those who do not deserve the death penalty because of their mental disability. *See, e.g., State v. Best*, 467 S.E.2d 45, 54 (N.C.) (death sentence for defendant with I.Q. of 70 but employed and able to function in society), *cert. denied*, 519 U.S. 878 (1996); *State v. Skipper*, 446 S.E.2d 252, 277, 282 (N.C. 1994) (death sentence for defendant with I.Q. of 69, but who had been married for five years, worked in several jobs, and for seven years owned and operated a business that he sold for approximately $25,000), *cert. denied*, 513 U.S. 1134 (1995); *State v. Steen*, 536 S.E.2d 1, 19 (N.C. 2000) (death sentence for defendant with I.Q. of 70 to 79, but who was competent to manage financial transactions, had ability to understand, retain and follow instructions, oriented well to his job and duties, had good common sense, and, except for slow speech, was mentally alert, and had the capacity to premeditate and plan his crime), *cert. denied*, 531 U.S. 1167 (2001); *State v. Spruill*, 452 S.E.2d 279, 305

(N.C. 1994) (death sentence for defendant who, while immature and dependent with I.Q. of 72, had worked as automobile mechanic and in a shipyard, moved on to a better position, attended church and functioned quite well in the community), *cert. denied*, 516 U.S. 834 (1995); *Ex parte Borden*, 769 So.2d 950, 957 (Ala. 2000) (death sentence for defendant with I.Q. of 66, but who had ability to know and distinguish right from wrong and was not suffering from any mental disorder sufficiently severe to affect his motivation to commit the crime), *cert. denied*, 531 U.S. 961 (2000); *People v. Smithey*, 978 P.2d 1171, 1221-1222 (Ca. 1999) (death sentence for defendant with I.Q. of 70 who had obvious difficulty abiding by law and functioning successfully in society but nevertheless could communicate, take care of immediate personal needs, perform skilled labor, earn money, form friendships, drive and repair automobiles, and adapt well to living and working in prison), *cert. denied*, 529 U.S. 1026 (2000); *State v. Comeaux*, 699 So.2d 16, 37 (La. 1997) (defendant with I.Q. of 68 made no showing that degree of mental impairment coupled with young age rendered him incapable of acting at level of culpability required for imposition of death penalty), *cert. denied*, 522 U.S. 1150 (1998); *Hill v. State*, 953 P.2d 1077, 1083-1084 (Nev.) (death sentence for defendant with I.Q. of 60 as child and full scale I.Q. of 68 as adult, but who committed brutal crimes, could understand nature of proceedings, and knew difference between right and wrong), *cert. denied*, 525 U.S. 1042 (1998); *Jones v. Johnson*, 171 F.3d 270, 276 (5th Cir.) (even assuming that defendant's limited ability constituted severe handicap, defendant presented no evidence showing requisite nexus between his handicap and

the criminal act), *cert. denied*, 527 U.S. 1059 (1999); *King v. State*, 539 S.E.2d 783, 801 (Ga. 2000) (claim of retardation rebutted by evidence that King helped plan the crime, and coldly executed the victim); *State v. Brooks*, 648 So.2d 366, 377 (La. 1995) (death sentence for defendant with an I.Q. of 44 to 67, but who could drive a car and operate a forklift and expert testimony adduced that the I.Q. did not show full range of Brooks' ability).

There is simply no basis upon which this Court should accept Atkins' cynical hypothesis that juries are unable to discern a defendant's level of culpability. There is even less basis upon which the Court should allow the important decision of what punishment is most appropriate, considering both the crime and the defendant, to be dictated by an "expert" or, worse yet, some association of "experts" who may develop guidelines which have absolutely no connection to a particular defendant's individual culpability or capabilities.

B. There Is No National Consensus Against Execution Of The Mentally Retarded.

In 1989, the Court considered and rejected the notion that there was a "national consensus" against execution of mentally retarded capital defendants. *Penry*, 492 U.S. at 340. At the time of *Penry*, only one State had passed legislation prohibiting such executions, and only one other was about to do so. The Court held that "[w]hile a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the process of a maturing society,' there is insufficient evidence of such a consensus

today." *Penry*, 492 U.S. at 340. Atkins argues that the "someday" referred to in *Penry* "has arrived." (Atkins Br. at 40). According to Atkins, there now exists a national consensus because, since *Penry*, seventeen additional States have enacted statutes prohibiting the execution of capital defendants who are mentally retarded. Nevertheless, no *national* consensus exists against the execution of capital defendants who are mentally retarded but otherwise have the mental capacity to plan, premeditate and deliberate with a specific intent to kill, and thereafter carry out a capital murder.[21]

Eighth Amendment judgments are informed by objective factors. *Stanford*, 492 U.S. at 369. "This approach is dictated both by the language of the amendment – which proscribes only those punishments that are both 'cruel and *unusual*' – and by the 'deference [the Court] owe[s] to the decisions of the state legislatures under our federal system.' " *Id.* at 369-70 (emphasis in original) (quoting *Gregg v. Georgia*, 428 U.S. 153, 176 (1976)); *see Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

First and foremost among the objective indicia that reflect the public attitude toward a given punishment are the statutes passed by the state legislatures as society's elected representatives. *Stanford*, 492 U.S. at 370; *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987); *Gregg*, 428 U.S. at 173. In deciding there was no national consensus

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[21] "Consensus" means agreement of opinion, testimony and so on. *The Concise Oxford Dictionary* 258 (5th ed. 1964). It is also defined as group solidarity in sentiment and belief, or a general agreement. *Webster's Ninth New Collegiate Dictionary* 279 (1983).

against the imposition of capital punishment on sixteen and seventeen-year-old capital defendants in *Stanford*, the Court noted that only fifteen States which authorized the death penalty declined to impose such punishment upon sixteen-year-old murderers and only twelve States declined to impose it on seventeen-year-old murderers. Twenty-two death penalty States, however, permitted sixteen-year-olds to be sentenced to death. *Stanford*, 492 U.S. at 370.

Similarly, twenty States continue to include mentally retarded persons in the death-eligible class. Indeed, of the thirty-eight death penalty States, only eighteen – less than a majority – have some sort of statute prohibiting the execution of mentally retarded capital offenders. "This [number] does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual." *Stanford*, 492 U.S. at 370-371.

Of the eighteen States which have enacted laws against the imposition of capital punishment on defendants with mental retardation, eight expressly have made their laws prospective only.[22] And, the wording used in

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[22] The eight States with prospective-only laws are:

Arkansas: Under 1993 act, mentally retarded defendants who do not raise the affirmative defense of mental retardation are not exempt from execution. *See* Ark. Code Ann. § 5-4-618(d)(1) (a defendant "shall raise the special sentencing provision of mental retardation prior to trial"); *Reams v. State*, 909 S.W.2d 325, 327 (Ark. 1995) (mental retardation is an affirmative defense which will not be addressed on appeal if not properly raised at trial), *cert. denied*, 519 U.S. 832 (1996). *See also City of Cave Springs v. City of Rogers*, 37 S.W.3d 601 (Ark. 2001) (legislation is presumed to apply prospectively only unless

four other state statutes suggests that the laws do not apply to mentally retarded defendants upon whom a

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there is an express provision to the contrary in the legislation at issue).

Arizona: "This section applies prospectively only to cases in which the state files a notice of intent to seek the death penalty after the effective date of this Act [Apr. 26, 2001]." Ariz. Rev. Stat. § 13-703(j) (2001).

Florida: Florida Stat. § 921.137(8) (2001): "This section does not apply to a defendant who was sentenced to death prior to the effective date of this act [Jun. 12, 2001]."

Indiana: Mentally retarded capital defendants tried before July 1, 1994, are not exempt from execution. Ind. Code §§ 35-50-2-9 and 35-36-9-6 (1998); *Rondon v. State*, 711 N.E.2d 506, 512 (Ind. 1999) ("the General Assembly specifically legislated and the Governor signed into law a statute of repose for claims of mental retardation in capital cases tried before July 1, 1994.").

Kansas: Provisions of Kan. Stat. Ann. § 21-4623 "shall be applicable only to persons convicted of crimes committed on or after July 1, 1994." Kan. Stat. Ann. § 21-4631(c) (1994).

Kentucky: Mentally retarded capital defendants tried before July 1, 1990, are not exempt from execution. Ky. Rev. Stat. Ann. § 532.140 (1990); *Skaggs v. Parker*, 235 F.3d 261, 274 n.4 (6th Cir. 2000) (" . . . this statute, which became effective July 1, 1990, [ ]does not apply to Skaggs, who was tried in 1982 for murder"), *cert. denied*, 122 S. Ct. 322 (2001).

Maryland: Mentally retarded capital defendants sentenced to death prior to July 1, 1989, are not exempt from execution unless resentenced. Md. Code Article 27, § 412(f) (1989); *Booth v. State*, 608 A.2d 162, 174 (Maryland statute exempting mentally retarded from execution applies retrospectively to individuals awaiting trial or sentencing on July 1, 1989, and prospectively to any individual sentenced on or after July 1, 1989), *cert. denied*, 506 U.S. 988 (1992).

death sentence was imposed prior to the effective date thereof.[23] Thus, of the eighteen States which Atkins says "prohibit" the execution of mentally retarded capital murderers, at least eight, and arguably twelve, still allow for the imposition of capital punishment on some mentally retarded capital defendants.

The eight States which unequivocally permit the execution of some mentally retarded capital murderers simply cannot be included in the category of States which ban execution of mentally retarded defendants. The Legislatures of these States considered whether their laws

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Missouri: "The provisions of this section shall only govern offenses committed on or after August 28, 2001." Mo. Rev. Stat. § 565.030.7 (2001) (emphasis added).

[23] The four States which have laws that facially do not apply to mentally retarded defendants sentenced prior to the effective dates are the following:

Colorado: "A sentence of death *shall not be imposed* upon any defendant who is determined to be a mentally retarded defendant pursuant to section 16-9-401 [a section requiring a defendant to file a pretrial motion for determination whether he is mentally retarded]." Colo. Rev. Stat. § 16-9-403 (1993) (emphasis added).

Connecticut: No court or jury shall "*impose* the sentence of death" on a mentally retarded defendant. Conn. Gen. Stat. § 531-46b(h) (emphasis added). The Connecticut statute became effective on July 1, 2001.

South Dakota: The death penalty "*may not be imposed* upon any person who was mentally retarded at the time of the offense." S.D. Codified Laws § 23A-27A-26.1 (2000) (emphasis added).

Washington: Under 1993 change in law, defendants who were mentally retarded at the time the murder was committed shall not "be sentenced to death." Wash. Rev. Code § 10.95.030(2) (1993).

should apply to all mentally retarded capital defendants, and expressly chose only to implement a ban on the execution of some mentally retarded offenders. The decisions of these Legislatures to bar the execution of mentally retarded killers prospectively preserves the authority of these States to execute mentally retarded capital defendants who were convicted prior to the enactment of the respective bans. In effect, the prospective-only enactments create two categories of mentally retarded murderers: those who can be executed and those who cannot be executed. Because there is not even a consensus in these eight States against the execution of all mentally retarded murderers, they certainly cannot be used as proof of some sort of *national* consensus against the execution of mentally retarded capital defendants. Indeed, when these States are removed from the list of States prohibiting the execution of mentally retarded capital defendants, the number of States banning the execution of all mentally retarded killers falls to ten.[24]

Atkins' numeric manipulation is further illustrated by his use of New York as proof of a national consensus against execution of mentally retarded capital murderers. New York's statute specifically provides that a sentence of death "may not be set aside . . . upon the ground that the defendant is mentally retarded" if "the killing occurred while the defendant was confined or under custody in a state correctional facility or local correctional institution." N.Y. C.L.S. § 400.27.12(d) (1995). Thus, like the States which enacted prospective-only bans on the

[24] Of course, if Colorado, Connecticut, South Dakota and Washington are excluded, the number of States categorically prohibiting such executions falls to five.

execution of mentally retarded capital offenders, New York's law creates both death eligible and non-death eligible mentally retarded capital defendants. New York demonstrates a *lack* of consensus for a total ban on executions of mentally retarded capital defendants and lowers the number of States absolutely banning the execution of mentally retarded capital offenders to nine.[25]

"It is not the burden of [Virginia], to establish a national consensus approving what their citizens have voted to do; it is [Atkins'] 'heavy burden,' *Gregg*, 428 U.S. at 175, to establish a national consensus *against* it." *Stanford*, 492 U.S. at 373 (emphasis in original). Although Virginia has no burden here, it is significant that twenty States which presently have capital punishment have not affirmatively considered and legislated an enactment to ban mentally retarded murderers from death eligibility. Furthermore, Atkins' attempt to create a national consensus by adding the twelve States which presently do not authorize any capital punishment to the pool of death penalty States which prohibit execution of the mentally retarded must be rejected. The number of States without capital punishment may bear upon the question whether

[25] Tennessee also is a State that should not be counted on Atkins' side of the ledger on the "consensus" question. Tennessee's statute prohibiting execution of the mentally retarded is not retroactive and thus, it does not categorically prohibit the execution of all mentally retarded murderers. *See Van Tran v. State*, 2001 Tenn. LEXIS 820, *21 (December 4, 2001). However, despite the express will of Tennessee's citizens that execution of the mentally retarded be prohibited prospectively only, the Tennessee Supreme Court has held as a matter of federal and state constitutional law that mentally retarded murderers cannot be executed. *Id.* at *54-55.

a consensus against capital punishment exists in general, but it is irrelevant to the specific inquiry in this case: whether the execution of a capital defendant who is mentally retarded constitutes cruel and unusual punishment under the Eighth Amendment. *Stanford*, 492 U.S. at 370 n.2. (noting that non-death penalty States play *no role* in determining whether it is cruel and unusual to execute juveniles). The issue before the Court is not whether there is a national consensus for or against capital punishment; rather it is whether mentally retarded capital defendants should be exempt from capital punishment as a matter of constitutional law.

In any event, even if those States which have no capital punishment were included in the mix, the fact remains that at least twenty-nine, and perhaps as many as thirty-three, States have not categorically prohibited the execution of all mentally retarded capital murderers. Because so many States do not currently ban the execution of mentally retarded capital defendants, "there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for [the Court] to conclude that it is categorically prohibited by the Eighth Amendment." *Penry*, 492 U.S. at 335. *See Tison*, 481 U.S. at 154-158 (Court declined to find national consensus against imposition of death penalty for major participation in felony with reckless indifference to human life where only eleven States rejected its use in such circumstances).

Even in those States where the execution of mentally retarded offenders is prohibited, there are significant differences as to exactly who it is that is included under the protective umbrella of prohibition. For example, some States require the allegedly mentally retarded capital

defendant to have an I.Q. of below 70 and to display "substantial" deficits in adaptive behavior. *See, e.g.*, Ky. Rev. Stat. § 53.2-130-140 (1990). Other States also require an I.Q. below 70 but require the capital defendant to exhibit only "deficits" in adaptive behavior. *See* Neb. Rev. Stat. § 28-105.01 (2000); N.M. Stat. Ann. § 31-20A-2.1 (1991). Still others require a 65 or below I.Q. coupled with a "significant" impairment in adaptive behavior. *See* Ark. Code Ann. § 5-4-618 (1993); Ariz. Rev. Stat. § 13-3982 (2001). Some have no minimum I.Q. requirement and list as their sole requirement a "substantial" impairment in adaptive behavior, *see* Ind. Code § 35-36-9-1 (1994) et seq., or an "impairment" in adaptive behavior. *See* Ga. Code. Ann. § 17-7-131(1) (1988). The newness of these State laws as well as the wide divergence between them is reflective of the non-homogeneous nature of the mentally retarded and is further evidence that no national consensus against their execution exists.[26] *See Thompson*,

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[26] The differing approaches utilized by the States highlight the serious problem with using the psychiatric community's definition of mental retardation to form a constitutional rule. Psychiatric categorizations and definitions change. For example, the American Psychiatric Association at one time considered homosexuality to be a clinical mental disorder, *see* Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S.Cal.L.Rev. 527, 557 (1978), but did not consider sociopathy to be a mental disease. *See Blocker v. United States*, 274 F.2d 572, 573 (D.C. Cir. 1959). Because these categorizations and definitions regularly change, any constitutional rule founded upon them could be rendered obsolete by mental health professionals and without the benefit of a legislative or judicial act. And if the constitutional rule remained static despite a definitional shift within the psychiatric community, the constitutional rule would not be in keeping with the current standards and norms of the mental health professionals.

487 U.S. 859 (Scalia, J., dissenting) (noting that a purported national consensus must be "sufficiently uniform and of sufficiently long standing" to render a punishment cruel and unusual).

Left with no persuasive argument that the consensus of the American people – as reflected by the laws enacted by state legislatures – is soundly against execution of the mentally retarded, Atkins turns for support to the views of foreign countries and various interest groups, some of whom filed amicus briefs. In *Stanford*, however, this Court expressly "declined to rest constitutional law upon such uncertain foundations." *Stanford*, 492 U.S. 377. "A revised national consensus so broad as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved." *Id.* As demonstrated above, only nine death penalty States, at most, ban the execution of *all* mentally retarded capital defendants. Twenty-nine death penalty States do not. Consequently, "[a]s far as the primary and most reliable indication of consensus is concerned – the pattern of enacted laws – [Atkins has] failed to carry [his heavy] burden." *Id.* at 373.

Moreover, in determining whether standards of decency have "evolved," this Court looks to the conceptions of decency of modern *American* society as a whole. *Stanford*, 492 U.S. at 369. The purported standards of decency of other countries are an inappropriate means of establishing the fundamental beliefs or national consensus of *this* Nation:

> The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well. But where there is not first a settled consensus among our own people, the views of other nations, . . . cannot be imposed upon Americans through the Constitution."

Thompson, 487 U.S. at 868-869 (Scalia, J., dissenting) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). That twenty-nine of the thirty-eight States with capital punishment presently do not categorically prohibit the imposition of capital punishment upon all mentally retarded capital defendants is determinative of the *absence* of a national consensus against such executions. Indeed, that number *resolves* the question before this Court, even if the resolution is inconsistent with the views or practices of other Nations. The fact that some or all foreign Nations agree with Atkins is no more relevant than that those Nations would not impose capital punishment at all, or may have standards of due process different from our own. *Thompson*, 487 U.S. at 868-69 n.4.

Atkins has presented this Court with no national execution statistics or national jury verdict data to shed light on whether application of capital punishment to mentally retarded murderers has been so abandoned that it should be considered unacceptable. *See Thompson*, 487 U.S. at 851; *Coker*, 433 U.S. at 592. He has not informed the Court of the number of mentally retarded murderers who actually have been sentenced to death since *Penry*

was decided in 1989. He does not indicate how many juries have declined to impose the death penalty on mentally retarded capital defendants or how many times prosecutors have exercised their discretion in refraining from seeking the death penalty in such cases.

Of course, even if Atkins had done so, as a practical matter statistics or data carry little weight in this regard because a "far smaller number of capital murders are committed" by capital defendants with mental retardation than are committed by defendants without mental retardation. *See Stanford*, 492 U.S. at 374 (noting that statistics regarding the number of juveniles actually executed had little significance when it was undisputed that a far smaller number of capital crimes were committed by those under age eighteen). Atkins simply has not established the proposition that capital punishment for mentally retarded killers is categorically unacceptable to prosecutors and juries. Without such data, the Court cannot reliably infer a consensus that juries are more reluctant to impose capital punishment on a mentally retarded capital defendant under the specific and individualized facts of a particular case, than on other murderers. *Id.*[27]

This Court is well aware, in any event, of the danger in inferring a settled societal consensus from statistics. In

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[27] Indeed, as this Court noted in *Stanford*, it is probable that the very considerations which induce Atkins and his supporters to believe that death never under any circumstances should be imposed on mentally retarded capital defendants in fact cause prosecutors and juries to believe that it *rarely* should be imposed. *See Stanford*, 492 U.S. at 374. Such a deduction, however, does not support the consensus necessary to the sea change in constitutional law espoused by Atkins.

Thompson, Justice O'Connor noted that, when the Court heard oral argument in 1972 in *Furman v. Georgia*, 408 U.S. 258 (1972), there had been a steady stream of States abolishing, or moving toward abolition, of the death penalty and executions had ceased completely beginning in 1968. *Thompson*, 487 U.S. at 855. Such statistics might have suggested that capital punishment "had become a relic implicitly rejected by a new societal consensus." *Id.* at 855. However,

> [the Court] now know[s] that any inferences of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.

Id. (O'Connor, J., concurring).

The fact remains that a majority of the States which provides for capital punishment still permits it to be imposed upon mentally retarded capital defendants. "While a national consensus against execution of the mentally retarded may someday emerge reflecting the evolving standards of decency that mark the progress of a maturing society," *Penry*, 492 U.S. at 340, it has not yet done so.

III. ATKINS IS NOT A MENTALLY RETARDED CAPITAL DEFENDANT.

As Atkins' amicus APA admits, a diagnosis of mental retardation requires three things: significant subaverage intellectual functioning, concurrent deficits or impairments in present adaptive functioning in at least two of eleven areas,[28] and an onset before the age of eighteen. *See* Brief of amicus APA at 13; DSM-IV-TR at 49. Even if Atkins could meet the first two requirements, he *never* was diagnosed as mentally retarded before the age of eighteen.[29]

Only his court appointed expert, Dr. Evan Nelson, found him to be mentally retarded, and this was immediately prior to his capital murder trial.[30] Furthermore,

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[28] The DSM-IV-TR identifies these areas as: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. DSM-IV-TR at 49.

[29] Atkins' amicus APA also argues that, like with biological age, there is no "line-drawing problem" in forming a constitutional rule against executing the mentally retarded because "individuals with mental retardation form a well-demarcated group that is defined by . . . deficits in both intellectual and adaptive functioning." (Br. for amicus APA at 11-12). That clearly is not the case. Like the population at large, the mentally retarded are a heterogeneous group and, unlike with biological age, experts certainly can, and in Atkins' case actually did, disagree about whether an individual is mentally retarded.

[30] According to amicus APA, a diagnosis of mental retardation is appropriate only after *two* qualified mental retardation professionals separately administer diagnostic tests and reach identical conclusions that the tested individual is mentally retarded. (*See* Br. of amicus APA at 13.)

Nelson never specifically identified, as the DSM-IV-TR requires, any deficits in Atkins' present adaptive functioning. Rather, as Atkins admits (Atkins Br. at 43), Nelson opined only that Atkins had demonstrated a "lack of *success* in pretty much every domain of his life." (JA 442, emphasis added).

Nelson's conclusion, however, is insufficient to establish that Atkins' adaptive functioning was impaired to any extent let alone to the extent required for him to be classified as mentally retarded under the DSM-IV-TR. *See* Brief of amicus APA at 18 (A diagnosis of mental retardation "must be made by qualified mental retardation professionals who conduct a complete mental retardation evaluation adequately covering all three necessary criteria for diagnosis"). *See also Atkins II*, 534 S.E.2d at 320 ("Dr. Nelson never identified an area of significant limitation in Atkins' adaptive functioning other than what he termed Atkins' 'academic failure.' ").

On the other hand, Dr. Samenow expressly found that Atkins had "no lack of ability to adapt and to take care of [his] basic needs." (JA 484). Atkins, for instance, could wash his own clothes and cook. In addition, Atkins could make change and utilize the public transportation system.[31]

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[31] Atkins dismisses Dr. Samenow's testimony that there were no deficits in Atkins' adaptive functioning by alleging that Samenow's conclusion rests on nothing other than Atkins' "inflated" self-report. (Atkins Br. at 47). But Atkins did not just tell Samenow that he could cook. He actually provided

Dr. Samenow also disagreed with Dr. Nelson's conclusion that Atkins possessed subaverage intelligence. According to Dr. Samenow, Atkins was of "average intelligence, at least." (JA 476). Dr. Samenow explained that his opinion differed from Nelson's because, when Dr. Samenow administered a battery of tests to Atkins, he "pushed" Atkins "just a little" to think harder or explain his answers further. When pushed, Atkins gave Samenow a "more sophisticated answer" or "a fuller response indicating that he had a better understanding . . . than he had indicated with Dr. Nelson." (JA 479). Samenow explained that Atkins' demonstrated ability to perform better when "pushed" was consistent with notations contained in Atkins' school records, which indicated that Atkins lacked motivation, did not concentrate, and could do better in school than his academic performance indicated. Samenow summed up Atkins' school records as showing an individual who "chose to pay attention sometimes, not to pay attention others, and did poorly because he did not want to do what he was required to do." (JA 481). Samenow concluded that Atkins' poor performance in school "wasn't a matter of a lack of ability. It was a matter of a lack of performance." (JA 536a).[32]

Samenow with his own recipe for cooking chicken. And Atkins did not just tell Samenow he could make change. He demonstrated this ability by correctly answering Samenow's mathematical questions about money. (JA 480).

[32] Indeed, Nelson's opinion that Atkins demonstrated a "lack of success in pretty much every domain in life" is consistent with a lack of motivation and Samenow's conclusion that Atkins was a person who simply "did not want to do what he was required to do." In other words, Atkins lacked success in

Dr. Nelson, on the other hand, despite having reviewed Atkins' academic records which expressly documented Atkins' lack of motivation, assumed that Atkins' initial responses to the various test questions was the best that Atkins could do. He, thus, labeled Atkins as mentally retarded despite the fact that Atkins can and did perform better on the tests than his own testing had indicated.

Samenow additionally offered other evidence that Atkins possessed at least average intelligence: Atkins was knowledgeable about current events; knew when John F. Kennedy had been President; could put together stories with "cause, effect, past, present and future;" talked freely, "developed ideas and concepts;" and used sophisticated words "correctly in syntax." (JA 536). Atkins admits that language usage correlates with general cognitive ability and states that individuals who truly are mildly mentally retarded have "substantial deficits in the complex area[ ] of . . . syntax." (Atkins Br. at 48-49 n.55). Atkins, however, has no deficits in "the complex area of syntax." According to Dr. Samenow, Atkins' vocabulary not only was extensive and "sophisticated," he used that vocabulary "correctly" and "in syntax." (JA 536).

Because Atkins is not a mentally retarded person, resolution of the Eighth Amendment issue cannot "affect the behavior of the [Commonwealth] towards [Atkins]." *See Lawyer v. Department of Justice*, 521 U.S. 567, 579 (1997); *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). Even if this Court were to decide that execution of mentally

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life not because he was mentally retarded but because he was not motivated to succeed.

retarded capital murderers is unconstitutional, Atkins' execution would not be prohibited because *he is not a mentally retarded capital murderer.* There is, therefore, no case or controversy and resolution of the Eighth Amendment question in this case would amount to nothing more that an improper advisory opinion. *Helms*, 482 U.S. at 761.

CONCLUSION

The judgment of the Supreme Court of Virginia should be affirmed.

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No. 00-8452

In The

Supreme Court of the United States

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

PETITIONER'S REPLY TO RESPONDENT'S MOTION TO DISMISS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

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PETITIONER'S REPLY TO RESPONDENT'S MOTION TO DISMISS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

Respondent's "Motion to Dismiss Writ of Certiorari as Improvidently Granted" argues that the issue which the Court has identified as warranting review in this case – whether execution of a mentally retarded defendant with a 59 I.Q. violates the Eighth Amendment as incorporated into the Fourteenth – was neither raised nor decided below. This is the selfsame argument that respondent made in Point I at pages 1-3 of its *Supplement to Commonwealth's Brief in Opposition*, which the Court has already considered and rejected. Respondent's present expansion of the argument into five printed pages offers no reason to reconsider it. Respondent should not be encouraged to impose upon the Court with lengthy DIG motions after his attempts to persuade the Court by a shorter version of the same point in his BIO have failed.

In any event, respondent's point was and is wrong. Petitioner's brief in the Virginia Supreme Court was organized in a series of "Questions Presented and Argument[s]" with Question Number 1 being "Is the Sentence of Death Excessive." (*Opening Brief of Appellant* filed April 5, 2000 in the Virginia Supreme Court, page 11 [Appendix to Petition for Certiorari, page 131].) The one-page argument under that Question began with a sentence which is half quoted in respondent's DIG motion – "While the 8th Amendment's prohibition against cruel and unusual punishment does not categorically prohibit the imposition of the death penalty on Mr. Atkins because he is mentally retarded, *Penry v. Lynaugh*, 492 U.S. 302 . . . (1989)" (*ibid.*

[Appendix, page 131], quoted without the "While" at page 4 of respondent's DIG motion) – and which then went on to argue that "whether or not the death penalty is excessive is to be judged at any given time by the 'evolving standards of decency that mark the progress of a maturing society.' *Trop v. Dulles*, 356 U.S. 86, 101 (1958)" (*ibid.* [Appendix, page 131]). It next observed that counsel could find no cases in which a person with a 59 I.Q. had been sentenced to death in Virginia, and that "[w]hile this Court [the Virginia Supreme Court] has upheld death sentences for individuals with low IQs [in the 69-70 range, citing cases] . . . , today society's standards have evolved to the point that imposition of the death penalty on an individual with a 59 IQ who is not eligible for parole is excessive." (*Ibid.* [Appendix page 131].)

Plainly, petitioner was invoking both the federal Eighth Amendment (explicitly) and the Virginia Supreme Court's obligation to conduct proportionality review under Va. Code § 17.1-313(C) (implicitly) in contending – exactly as McCarver contended in *McCarver v. North Carolina* – that the post-*Penry* evolution of society's standards (as reflected even in Virginia's own capital-sentencing practice) had eroded the controlling force of the *Penry* ruling, at least as to persons with retardation as severe as Daryl Atkins'. It is impossible to make any other sense of the brief's reference – twice in two paragraphs – to "evolving standards," an Eighth Amendment concept (explicitly quoted from *Trop*) which has no apparent relevancy to Virginia's statutory proportionality-review process.

We say "plainly" because even respondent's counsel did not misunderstand the point or affect not to see it.

The *Brief of the Commonwealth* in the Virginia Supreme Court described Atkins' argument on appeal as two-fold. The Commonwealth recited that Atkins was first invoking Virginia's proportionality-review jurisprudence and then, "[i]n addition, Atkins says that, for the same reasons, the Eighth Amendment's evolving standards of decency prohibit imposition of the death penalty in this case." (*Id.* at page 9 [Appendix, page 150].) The Commonwealth dealt with the proportionality-review aspect of Atkins' mental-retardation claim by recounting aggravating features of his crime and record and citing a number of "comparable" Virginia cases upholding death sentences. Then, "[r]egarding Atkins' assertion that the Eighth Amendment prohibits imposition of the death penalty on a person with a purported I.Q. of 59" (*Brief of the Commonwealth*, page 10 [Appendix, page 151]), the Commonwealth argued, *one*, that the claim was procedurally defaulted because it had not been presented to the trial court; *two*, that the evidence of Atkins' retardation "was in sharp conflict"; and, *three*, that "[i]n any event, 'execution of mentally retarded offenders contravenes neither those practices condemned at the time the Bill of Rights was adopted nor the evolving standards of decency that mark the progress of a maturing society.' *Penry v. Lynaugh*, 492 U.S. 302, 351 (1989) (internal quotation marks omitted)" (*ibid.* [Appendix, page 151]).[1] A footnote to the last point says that "To the extent that Atkins argues that societal standards of decency have

[1] The Commonwealth did not assert, as it does now, that Atkins' assignments of error were insufficiently broad to encompass the Eighth Amendment claim.

evolved since *Penry* and now prohibit his execution, Atkins has offered absolutely no support for this novel proposition." (*Id.* n. 2 [Appendix page 151].)

With the issues thus submitted, the Virginia Supreme Court noted two of the Commonwealth's three responses to Atkins' Eighth Amendment argument – the Commonwealth's point that "the evidence was in conflict regarding the question whether Atkins is mentally retarded" (*Atkins v. Commonwealth*, 534 S.E.2d 312, 318 (Va. 2000) [Appendix, page 25]) and the Commonwealth's contention, "[q]uoting from Penry v. Lynaugh . . . , that execution of a defendant who is mentally retarded does not contravene the practices that were condemned when the Bill of Rights was adopted or the evolving standards of decency" (*id.* at 318-319 [Appendix pages 25-26]. The Virginia Supreme Court did *not* advert to Virginia's procedural-default argument, let alone rely upon it.

In short, while the terse, elliptical submission made to the Virginia Supreme Court by Atkins' counsel could have done a far better job of separately enumerating each "book and verse" relied on (*Eddings v. Oklahoma*, 455 U.S. 104, 114 n. 9 (1982)), it was sufficient to alert that court both to the Eighth Amendment aspect of his contention that death was an excessive punishment for his retarded client and to the evolving-standards-of-decency theory underlying it. *See, e.g., Taylor v. Kentucky*, 436 U.S. 478, 482 n. 10 (1978). Explicitly recognizing this, the respondent below tried and failed to persuade the Virginia Supreme Court to put decision off onto a state procedural ground. Respondent should not now be heard to assert, twice belatedly, that the federal constitutional issue which it

attempted unsuccessfully to divert the Virginia Supreme Court from considering was never there in the first place.

CONCLUSION

For the foregoing reasons, the Court should deny Respondent's motion.

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ATKINS REPLY BRIEF

I. RESPONDENT'S ARGUMENT HAS CONFUSED THE MANIFEST NATIONAL CONSENSUS AGAINST EXECUTING PEOPLE WITH MENTAL RETARDATION WITH THE *EVIDENCE* OF THAT CONSENSUS.

This Court has made clear that the Eighth Amendment prohibits punishments that are repudiated by a consensus of the American people. It has indicated that it looks to legislative enactments as the "clearest and most reliable objective evidence of contemporary values." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (*"Penry I"*). In Respondent's view, the dramatic legislative developments in the last dozen years are of no constitutional significance. This contention misperceives the role of public consensus in Eighth Amendment jurisprudence.

Respondent and its supporting *amici* are fixated on perceived differences among the eighteen State and two Federal statutes that now prohibit the infliction of the death penalty on mentally retarded persons. They argue that those differences destroy the usefulness of the enactments in ascertaining whether there is a national consensus opposing execution of individuals with mental retardation. Each enactment is inevitably the product of a unique legislative process, involving participation by a wide array of that State's citizens, including prosecutors, defense attorneys, judges, disability advocates, and other groups. In addition, each enactment was designed to fit into the statutory context of the particular State's death penalty laws *and* its own disability laws.

However, what is truly remarkable about these twenty statutes is their substantive consistency. Each of these legislatures set out to protect people with mental retardation from the death penalty, and each chose to protect a class of people possessing the same contours and features. Variations in the phrasing of the definitions do nothing to undercut their evidentiary value regarding the Nation's consensus on this question. A number of the States either incorporated by reference an already-existing statutory definition of mental retardation,[1] or adopted such a definition by including its text in the new statute.[2]

Respondent's and its supporting *amici's* attempts to find constitutional significance in minor wording variations are unpersuasive.[3] In no instance is there any evidence that any legislature was attempting to codify

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[1] *See, e.g.*, Conn. Gen. Stat. § 53a-46a(h) (2001) (incorporating Conn. Gen. Stat. § 1-1g (1958)); Mo. Ann. Stat. § 565.030 (West Supp. 2002) (incorporating Mo. Rev. Stat. § 630.005 (West 2000)).

[2] *Compare, e.g.*, Fla. Stat. Ann. § 921.137 (West 2001) *with* Fla. Stat. Ann. § 916.106(8) (West 1998); *and* N.C. Gen. Stat. § 15A-2005(a)(2) (West 2001) *with* N.C. Gen. Stat. § 122C-3(22) (West 1999).

[3] An example of manufacturing definitional differences where none exist is the suggestion by Respondent's *amicus* Criminal Justice Legal Foundation that Congress failed to define mental retardation consistently with the enactments of the States. *See* CJLF Br. at 16. This reflects a complete misreading of the Federal statutes involved. 18 U.S.C. § 3596(c) (1994) clearly contains two separate provisions: a prohibition on executing people with mental retardation, and, in the second sentence, a codification of this Court's prohibition on the execution of defendants who are incompetent. *Cf. Ford v. Wainwright*, 477 U.S. 399 (1986). Similarly, 21 U.S.C. § 848(l) (1988), which is the

something different than the generally accepted AAMR definition of mental retardation – and certainly no evidence that there was intent to protect a smaller clinical population.[4]

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first Congressional enactment on the subject, encompasses prohibiting executing individuals with mental retardation, individuals under the age of 18, or those who are incompetent. The incompetence provision in 18 U.S.C. § 3596(c) (1994) is no more a definition of mental retardation, than the similar provision in 21 U.S.C. § 848(l) (1988) is a definition of "a person who is under 18 years of age at the time the crime was committed." While a definition of mental retardation does not appear on the face of either Federal statute, it is clear that Congress considered the AAMR definition to be the relevant definition. *See* 134 Cong. Rec. H7259, 7282 (daily ed. Sept. 8, 1988) (statement of Rep. Levin); *id.* (statement of Rep. Bartlett).

[4] The only possible exception is Kansas, where the Legislature, adopting the death penalty *de novo*, included protection of defendants with mental retardation. In the course of doing so, the Legislature incorporated the statutory version of the AAMR definition already found in Kan. Stat. Ann. § 76-12b01(d) (1984), which involves the administration of institutions for people with mental retardation, but grafted onto it the additional clause "to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law." Kan. Stat. Ann. § 21-4623 (1994). The added language, of course, is an adaptation of language found in Model Penal Code § 4.01, which totally exculpates defendants who "lack[ ] substantial capacity," as contrasted to having "substantial *impairment*." (The judicially-adopted insanity defense in Kansas does not employ the Model Penal Code formulation. *State v. Smith*, 574 P.2d 548 (Kan. 1977).) It is unclear whether the final clause was intended to identify a subset of individuals with mental retardation who were not protected by the statute, or whether it was merely meant to be explanatory. The provision has been given no interpretation by the Kansas state courts.

Similarly, differences in the procedures under which the issue of mental retardation is to be resolved,[5] evidentiary matters,[6] and provisions regarding retroactive effect

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[5] Most States have chosen to resolve the question at a pretrial bench hearing. *See, e.g.*, Ind. Code § 35-36-9-5 (Michie 1994); Colo. Rev. Stat. Ann. § 16-9-402 (West 1993). The principal advantage of a pretrial determination is that it obviates the necessity of the additional expense of a capital trial if the defendant is not eligible for the death penalty. In addition, if the matter is resolved at a pretrial proceeding, the likelihood that the case will be resolved by a plea is enhanced. A few States have chosen to resolve the question at a later stage of the proceedings. *See, e.g.*, Fla. Stat. Ann. § 921.137 (2001). Other statutes are silent as to the timing of the procedures, and one permits the issue to be resolved either pretrial or during the trial. N.Y. Crim. Proc. Law § 400.27 § 12(c), (e) (McKinney 1995).

[6] Although all the States that have addressed the issue have placed the burden of persuasion on the defense, they have differed on the level of that burden.

Several States have created evidentiary presumptions based on IQ scores. *See, e.g.*, N. M. Stat. Ann. § 31-20A-2.1 (Michie 1991) (presumption of mental retardation from score of 70 or below); Ark. Code Ann. § 5-4-618 (Michie 1993) (rebuttable presumption of mental retardation from score of 65 or below); Neb. Rev. Stat. § 28-105.01(3) (1998 & Supp. 2000) (score of 70 or below is "presumptive evidence"); Ariz. Rev. Stat. Ann. § 13-703.02 (C) and (F) (West 2001) (triggering evaluation process with a score of 75 or less, and rebuttable presumption of mental retardation with score of 65 or below, with indication that 70 is the dispositive score). These evidentiary presumptions are to be distinguished from those statutes that include an IQ score as an actual *component* of their definition of mental retardation, all of which use the score of 70. *See, e.g.*, Tenn. Code Ann. § 39-13-203(a)(1) (1990); N. C. Gen. Stat. § 15A-2005(a)(1)(c) (2001); Wash. Rev. Code Ann. § 10.95.030(2)(c) (West 1993).

of the statutes[7] offer no support for the suggestion that the manifest consensus embodied in these enactments is somehow illusory. In each of these States (and twice in the Congress), legislators made the decision to prevent the execution of individuals with mental retardation, and then fashioned a statute, appropriate to their jurisdiction, that was designed to accomplish that goal.

In addition to attempting to challenge the existence of a national consensus through the text of the statutes, Respondent and its supporting *amici* deny the existence of the consensus by arguing that the enactments are insufficiently numerous. But this argument misperceives the role of statutory enactments in ascertaining a national consensus about punishments. This Court has never suggested that determining national sentiment about an Eighth Amendment issue is a matter of "[c]ounting noses among the state legislatures." *See* CJLF Br. at 14. Rather, the accumulation of enactments by different legislative bodies constitutes *confirmation* that a claimed consensus is sufficiently widespread and sufficiently durable to survive the process to passage in different political climates

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[7] Many legislatures have a general practice that disfavors legislation that affects ongoing cases, and in at least one instance, that presumption is constitutionally required. *See* N.M. Const. art. 4, § 34. The two courts that have bridged the gap from prospective-only statutes to inmates currently under sentence of death under their state constitutions have done so upon a finding of a consensus against executing people with mental retardation in their States. *Fleming v. Zant*, 386 S.E.2d 339 (Ga. 1989); *Van Tran v. State*, 2001 WL 1538508, ___S.W.3d ___ (Tenn. Dec. 4, 2001).

and divergent legislative settings. The legislative developments of the last dozen years certainly meet that standard.

The central misunderstanding in Respondent's argument is mistaking the statutes for the consensus they reveal. The punishments prohibited by the Eighth Amendment are not rendered unacceptable because of a compilation of statutes; they are unacceptable because they are inconsistent with the American people's collective standards of decency. The role of the statutes is evidentiary. Their purpose is to assure the Court, which has been understandably wary of relying on indicia of public opinion that may prove illusory or ephemeral, that this sentiment is true and reliable. See *Thompson v. Oklahoma*, 487 U.S. 815, 826-831 (1988) (plurality opinion); *id.* at 849-852 (concurring opinion of Justice O'Connor). This Court's opinions in cases like *Thompson; Ford v. Wainwright*, 477 U.S. 399 (1986); *Enmund v. Florida*, 458 U.S. 782 (1982); and *Coker v. Georgia*, 433 U.S. 584 (1977), do not prescribe a simplistic recipe or numerical formula for ascertaining a consensus. Rather, the cases reflect something more akin to a "totality of the evidence" test, with statutory enactments as an indispensable component of any claim of a settled national agreement. In this case, the totality of the available evidence reveals a clear and unmistakable consensus of the American people opposing the execution of individuals with mental retardation.

II. AN EIGHTH AMENDMENT RULE PROHIBITING THE EXECUTION OF ALL PERSONS WHO SUFFER FROM MENTAL RETARDATION IS BOTH NECESSARY AND APPROPRIATE.

Although Respondent argues that the current system "adequately protect[s] the interests of mentally retarded capital defendants," (Resp. Br. at 28), it does not contest the fact that the sentencing scheme in States like Virginia can result in death sentences for defendants with mental retardation. *Id.* at 31-33.[8] This is acceptable, according to Respondent, because defendants with mental retardation who are tried must be competent to stand trial and may potentially be eligible for outright acquittal because of their disability,[9] *id.* at 29, and because of heterogeneity among people with mental retardation. *Id.* at 19-25.

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[8] Respondent cites to several cases of defendants whom Respondent believes to have mental retardation who have been sentenced to death, and concludes that this proves that juries and courts "indisputably are capable of considering and giving full effect to 'mitigating evidence of mental retardation in imposing sentence.' " Resp. Br. at 31. It is unclear how the mere recitation of the cases demonstrates the correctness of the sentences imposed. The Legislature of one of the States cited, North Carolina, has concluded otherwise and one of the defendants cited has since had his death sentence vacated under the new North Carolina statute. *See* Emery P. Dalesio, *Inmate's Death Sentence Reduced: Killer is First Under New State Law to be Spared Because He is Retarded*, Charlotte Observer, December 15, 2001, at 4B.

[9] The notion that competence to stand trial and other such procedures are an argument against Constitutional protection of people with mental retardation is unpersuasive. Procedural protections were available, of course, in every circumstance in which the Court has recognized the need for categorical Eighth Amendment protection. *See, e.g., Thompson; Ford; Coker; Enmund.*

It is a truism that there are differences among people with mental retardation, as there are within any group. That fact alone is not dispositive of the issue whether the entire class of mentally retarded persons deserves Eighth Amendment protection from capital punishment. For example, minors under the age of 16 (*see Thompson*) are individuals with their own personalities (*cf.* Resp. Br. at 23) who differ from one another in many respects including intelligence, spanning the full range from intellectual brilliance to mental retardation. What matters for Eighth Amendment analysis is not whether there are differences, but rather *the constitutional relevance of the trait or traits that all members of the group have in common*. In the case of minors under the age of 16 (or 14 or 12 or any other age), the shared traits are limited maturity and duration of life experience. For individuals with mental retardation, the characteristics that *all* hold in common are the components of the definition: substantially reduced intellectual functioning, which causes disabling impact on the person's life, and which has existed since birth or early life. Every individual who has mental retardation shares these characteristics.

So the real issue is the relevance of these traits to the culpability of defendants facing capital charges.[10] The relevance of mental retardation to affected individuals' level of understanding of their acts, and thus their responsibility for them, has been universally recognized.

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[10] This, of course, parallels the policy judgment that was reached by each of the legislative bodies that enacted categorical protection from the death penalty for individuals with mental retardation.

And, for all of its belaboring of the diversity among mentally retarded individuals, Respondent's brief conspicuously fails to contest the demonstration made at pages 22-32 of Petitioner's brief that the defining characteristics of retardation – the features common to all persons diagnosed as mentally retarded – are disabling in the precise dimensions recognized by this Court's Eighth Amendment jurisprudence as bearing on the requisite personal culpability to justify a death sentence. Respondent is reduced to arguing that differences in capabilities among mentally retarded individuals preclude addressing the constitutional issue in terms of the class as a whole. The crux of this argument appears to be that some individuals with mental retardation are more able to improve their adaptive functioning than others, so the entire group cannot be treated collectively for purposes of Eighth Amendment adjudication. The argument fails for two basic reasons.

First and most important, the mere existence of differences in abilities among people with mental retardation is not dispositive of the question whether those at even the highest level of functioning have the degree of culpability demanded by the Eighth Amendment as the predicate for a constitutional sentence of death. Respondent simply assumes that since there are differences, some people with mental retardation *must*, of necessity, have a sufficiently high level of culpability to warrant punishment by death for capital crimes. But this Court has insisted that the death penalty is reserved for murderers with the highest level of personal blameworthiness and culpability – the worst of the worst. It is our contention that *no* individual with measured intelligence falling

in the lowest 2½ percent of the population comes within that category.

Second, Respondent is telling a half truth at best when it asserts that some mentally retarded persons are capable of undergoing an improvement in adaptive skills. The other and more relevant half of the truth is that the precondition for such improvement on the part of *any* mentally retarded person is a level of external assistance and support that may or may not be forthcoming, depending upon circumstances over which he or she has absolutely no control. As we noted at page 32 of Petitioner's brief, any occurrence of significant improvement in skill areas and basic functioning is crucially dependent upon educational and supportive services which a retarded person's familial, social, and economic circumstances sometimes do, but all too often do not, make possible and actually deliver. Pet. Br. at 32.

This point is not merely acknowledged but emphasized by the very authorities Respondent cites (Resp. Br. at 20-25) to support its assertion that mentally retarded individuals "are not a homogeneous group" but differ in their potential for adaptive improvement.[11] Indeed, the

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[11] DSM-IV-TR at 47 ("Individuals who had Mild Mental Retardation earlier in their lives manifested by failure in academic learning tasks may, with appropriate training and opportunities, develop good adaptive skills in other domains and may no longer have the level of impairment required for a diagnosis of Mental Retardation"); Andrea G. Zetlin & Gale M. Morrison, *Adaptation Through the Life Span*, in HANDBOOK OF MENTAL RETARDATION & DEVELOPMENT 481, 492 (Jacob A. Burack et al. eds., 1998) ("[S]upport systems are vitally important and are linked to the maintenance of health, social functioning, and

whole point of the literature collected by Respondent – with no apparent awareness of this irony – is that all

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psychological well-being. Within the population of adults with mental retardation, success in the community is significantly related to the amount of guidance and support available from others."); Robert H. Bruininks, et al., *Adaptive Behavior & Mental Retardation*, 21 JOURNAL OF SPECIAL EDUCATION 69, 69 (1987) ("[T]here are still critical needs for the development of sound theories and models of adaptive behavior to guide future research and practice, especially in the design of interventions to enhance the adjustment and opportunities for people with disabilities."); Robert B. Edgerton, *Retarded People of Adult Years*, 19(4) PSYCHIATRIC ANNALS 205, 208 (1989) (noting a critical need for research on the availability and quality of support services for certain groups of mentally retarded individuals, including those not diagnosed in early years and those who live in poverty, "who may now be neglected"); Edward Zigler, et al., UNDERSTANDING MENTAL RETARDATION 222 (1986) ("Only through a closer examination of what is best for each retarded individual . . . can we know how best to provide appropriate care."); B. Maughan, et al., *Mild Mental Retardation: Psychosocial Functioning in Adulthood*, 29 PSYCHOLOGICAL MEDICINE 351, 365 (1999) ("From a practice view-point, appropriate and accessible supportive services in adulthood would appear to be urgent needs for many individuals with MMR [mild mental retardation]."); Kevin S. McGrew, et al., *Relationship Between Measures of Adaptive Functioning and Community Adjustment for Adults with Mental Retardation*, 58(6) EXCEPTIONAL CHILDREN 517, 527 (1992) (further research can "provide important information to guide the development of training and intervention to improve the range of choices, integration, and quality of life for persons with mental retardation"); James R. Patton, et al., *Individuals with Mild Mental Retardation: Postsecondary Outcomes and Implications for Educational Policy*, 31(2) EDUCATION & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES 75, 83 (1996) ("It is a common misconception that persons with mild mental retardation are only minimally impaired and therefore not in need of substantial services."); Samuel F. Redding, *Life*

mentally retarded individuals share a critical need for support services if they hope to experience meaningful growth in adaptive behavior. Yet the availability and delivery of these support services are, for any given individual with mental retardation, a matter beyond his or her control. To argue that a mentally retarded individual like Daryl Atkins should be subjected to the penalty of death on the ground that *some* individuals with mental retardation *could* be capable of adaptive improvements *under optimal conditions created by skilled and sophisticated training and support* makes neither constitutional nor common sense.

The people of this country, through their Congress, and those of eighteen States, through their legislatures, have found it both appropriate and practical to address this issue by banning the execution of people with mental retardation as a class. There is nothing about the definition of mental retardation or about the composition of the group of people who have the disability that should dissuade this Court from treating them as a class for Eighth Amendment purposes.[12]

Adjustment Patterns of Retarded & Nonretarded Low Functioning Students, 45 EXCEPTIONAL CHILDREN 367, 368 (1979) (comparing adjustment of mentally retarded and nonretarded low-functioning students and finding that the mentally retarded group "exhibited life adjustment patterns which [were] . . . weak by comparison" to the nonretarded group). See also AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 7 (9th ed. 1992): "With appropriate supports over a sustained period, the life functioning of the person with mental retardation will generally improve."

[12] *Amicus* CJLF urges this Court, if it grants relief in this case, to weigh in on the issues of procedural implementation.

III. DARYL ATKINS IS CLEARLY AN INDIVIDUAL WITH MENTAL RETARDATION, WARRANTING PROTECTION BY A CONSTITUTIONAL RULE PREVENTING THE EXECUTION OF DEFENDANTS WITH THAT DISABILITY.

Respondent's attempt to portray Atkins as an individual who does not have mental retardation is without merit. The clinical evaluation by Dr. Nelson, *the only witness who actually tested Atkins*, clearly concluded that he had mental retardation.[13] And with good reason.

Daryl Atkins has a measured intelligence that places him in the lowest one percent of the population. (JA 274.) It is beyond dispute that this score constitutes "significantly subaverage" intellectual functioning. *See* AAMR, *Mental Retardation: Definition, Classification, and Systems of*

See CJLF Br. at 23-27. In our view, the resolution of any constitutional issues raised by State procedures for determining whether a defendant has mental retardation is "sufficient unto the day thereof." Those questions have not been briefed, or even identified, at this time. If such issues arise in particular States, their disposition should follow full consideration of their merits following fully briefed argumentation. *See generally Medina v. California*, 505 U.S. 437 (1992); *Cooper v. Oklahoma*, 517 U.S. 348 (1996); *Smith v. Robbins*, 528 U.S. 259 (2000). Anticipatory *dicta* are unnecessary.

[13] Testimony of Dr. Nelson. JA 439. Respondent claims that Dr. Nelson was the only individual to find Atkins to have mental retardation. Resp. Br. at 46. This ignores the fact that Dr. Brown's report that Atkins' "intellectual skills seemed to be in keeping with the previous diagnosis of mild mental retardation" (JA 331), and added that "it is my professional opinion, to a reasonable degree of medical certainty, that [this] diagnostic assessment is the most appropriate for Daryl Atkins." JA 332.

Supports (9th ed. 1992). The other two components of the definition of mental retardation, impairment of functioning and age of onset, *id.* at 1, are also fully satisfied in this case. The record is clear that Atkins' mental impairment has limited his functioning in numerous areas of his life. And "limited intellect has been a part of Daryl his entire life." (JA 278.)

The only testimony inconsistent with this conclusion came from the State's witness, Dr. Samenow, who, by his own admission, did not administer a scientifically accepted and clinically valid intelligence test to Atkins. Instead, he predicated his evaluation on isolated items that he plucked out of the IQ test administered by Dr. Nelson, other isolated items from an outdated memory scale, and an assortment of anecdotal observations and oddments collected through impromptu conversation. (*See* Pet. Br. 17-20.) His conclusion that Atkins was "of average intelligence, at least" (JA 476), reached without the systematic clinical testing that all professionals recognize as the necessary precondition for an evaluation of mental retardation[14] and inconsistent with all of the other evidence in the case, is inherently untenable. Daryl Atkins' possession of a few polysyllabic vocabulary words, the ability to memorize a moderate number of discrete facts (and even a recipe), and some rudimentary self-care skills are not inconsistent with a diagnosis of mental retardation. (*See* Pet. Br. 47-49.)

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[14] *See, e.g.*, Brief of *Amici Curiae* American Psychological Association, American Psychiatric Association, and American Academy of Psychiatry and the Law at 12-21.

CONCLUSION

The judgment of the Virginia Supreme Court upholding the imposition of a sentence of death on Daryl Atkins should be reversed.[15]

Respectfully submitted,

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[15] Pages 13-17 of Respondent's brief reiterate for the third time the jurisdictional argument made by Respondent in its BIO and in its motion to dismiss certiorari as improvidently granted, which the Court has denied. The argument is still meritless for the reasons stated in Petitioner's opposition to the latter motion.

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No. 00-8452

IN THE

Supreme Court of the United States

DARYL RENARD ATKINS,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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36 pp

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QUESTION PRESENTED

Should substantial portions of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) and *Stanford* v. *Kentucky*, 492 U. S. 361 (1989) be overruled in order to create a constitutional categorical exemption from capital punishment for mental retardation?

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IN THE

Supreme Court of the United States

DARYL RENARD ATKINS,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Death penalty law has undergone a long and painful evolution from its modern origins to its current comparatively settled state. Engrafting a *per se* exemption from capital punishment for mental retardation on to the Eighth Amendment

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

would reopen many old wounds inflicted during the development of death penalty jurisprudence. The current system already protects those for whom a death sentence would be clearly unjust, and, to the extent any further protection is needed, legislation specifying the standards and procedures in advance is a far preferable method for the law to develop in this area. A judicially crafted categorical exemption for capital punishment for those who successfully claim that they are mentally retarded is contrary to the interests of victims and society that the CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On August 16, 1996, the defendant Daryl Atkins and William Jones spent most of the day drinking and smoking marijuana at the house Atkins shared with this father. See *Atkins* v. *Commonwealth*, 510 S. E. 2d 445, 449 (Va. 1999) (*Atkins I*). Later that evening, after Atkins borrowed a gun from a friend, he and Jones went to the convenience store to buy some more beer. Lacking money, Atkins started panhandling. See *ibid.* At around 11:30 p.m., Eric Nesbitt went to the store. When Nesbitt prepared to leave the parking lot in his truck, Atkins hijacked the truck at gunpoint. Jones drove, Atkins was a passenger, and Nesbitt was kept hostage. See *ibid.* They stole $60 from Nesbitt's wallet, and after discovering Nesbitt's bank card, they proceeded to the branch of a local bank where Atkins forced Nesbitt to withdraw $200 from the drive-through ATM. *Ibid.*

Jones then drove the truck to a local school where he and the defendant discussed what to do with Nesbitt. *Ibid.* Jones urged that they just tie Nesbitt up and leave him. Instead, at Atkins' suggestion they drove to a secluded area that he knew. Atkins ordered Nesbitt out of the truck and shot Nesbitt to death. *Id.*, at 449-450. The autopsy showed that Nesbitt had eight different bullet wounds. *Id.*, at 450.

The two were subsequently arrested. Jones testified against Atkins, and Atkins was convicted of capital murder and sentenced to death. *Id.*, at 451, 453. The Virginia Supreme Court affirmed the conviction, see *id.*, at 457, but reversed the sentence because of an improper sentencing verdict form. See *id.*, at 456-457, n. 7. At retrial, Dr. Evan Nelson, a forensic psychologist, testified that the defendant's full scale IQ of 59 meant that he was mildly mentally retarded. *Atkins* v. *Commonwealth*, 534 S. E. 2d 312, 319 (2000) (*Atkins II*). This diagnosis was also based upon the defendant's inability to function independently as compared to the average person. See *ibid.* Dr. Nelson also "admitted that Atkins' capacity to appreciate the criminal nature of his conduct was impaired, but not destroyed; that Atkins understood that it was wrong to shoot Nesbitt; and that Atkins meets the general criteria for the diagnosis of an antisocial personality disorder." *Ibid.*

The jury also heard the testimony of the state's witness, Dr. Stanton Samenow, a forensic clinical psychologist. *Ibid.* He " 'sharply disagreed' " with Dr. Nelson's diagnosis that the defendant was mildly retarded. He instead concluded that Atkins had at least average intelligence. This conclusion was based upon "Atkins' vocabulary, knowledge of current events, and other factors from the Wechsler Memory Scale, Wechsler Adult Intelligence Scale, and Thematic Appreciation Test." *Ibid.* As one example, Atkins knew that John F. Kennedy was president in 1961. He also knew who was the current governor of Virginia, as well as the last two presidents. *Ibid.*

The defendant was again sentenced to death. See *id.*, at 314. The Virginia Supreme Court affirmed. See *ibid.* The opinion analyzed Atkins' alleged retardation under its proportionality review, where it held that the death sentence was not rendered disproportionate due to the defendant's intelligence. See *id.*, at 321. This Court granted certiorari on September 25, 2001.

SUMMARY OF ARGUMENT

At this late stage, this Court should not upset its capital punishment jurisprudence. From its fractured origins in *Furman* v. *Georgia*, Eighth Amendment death penalty law has gone through a long and painful development. It has now matured into a comparatively stable body of law. Accepting the defendant's arguments would reopen many of the wounds inflicted since *Furman*.

One of the foremost costs of *Furman*'s legacy is complexity. Death penalty law's extraordinary complexity makes it difficult for courts and legislatures to anticipate changes in the law, and hinders the recruitment of attorneys to represent capital defendants. Developing such a complex body of law necessarily led to many reversals as states failed to anticipate changes in doctrine. Burdensome retrials, frustrated deserts, and additional murders are all a legacy of the law since *Furman*. The frequent reversal of sentences due to a failure to foresee unforeseeable changes in the law also injected an arbitrariness into the system that *Furman* was intended to minimize.

Federalism has paid a heavy price for establishing *Furman*'s legacy. Massive federal regulation of the apex of state criminal law wounds federalism. Federalism is further harmed as states understandably overreact to the Eighth Amendment cases, such as declining to regulate the admissibility of mitigating evidence.

Fortunately, most of these costs have now been paid, as death penalty law is now stable. Legislatures and courts now know how to establish a capital punishment system that will withstand constitutional scrutiny. Even the tension between the narrowing and the individualized sentencing lines may be abating.

Creating a categorical exemption for mental retardation carries costs similar to those associated with the aftermath of *Furman*. Foremost is the damage to precedent. Substantial portions of *Penry* v. *Lynaugh* and *Stanford* v. *Kentucky* would

have to be overruled in order to fashion the exemption. There is no new national consensus against applying capital punishment to the mentally retarded. Under current law a consensus can only be found when an overwhelming majority of legislatures condemn a particular punishment or procedure. Since a majority of states with capital punishment do not exempt the mentally retarded, there can be no new consensus without overruling *Penry I* and *Stanford*.

Accepting the defendant's argument would also cause considerable disruption to death penalty systems. Under *Penry I*, any exemption for retardation would be fully retroactive on collateral review. Courts will therefore be inundated with retardation claims.

Finally, the categorical exemption would make death penalty law more complex and arbitrary. Instead of being treated like any other mitigating evidence, mental retardation claims will now require much more procedural complexity: a new standard of proof, an additional hearing, and new procedures to govern the hearing.

Arbitrariness will increase in two ways. First, the inevitable reversals in states that failed to anticipate this change repeats the arbitrariness that accompanied the developments since *Furman*. Additionally, setting the standard for determining something as imprecise as mental retardation necessarily involves drawing an arbitrary line between those who are and are not exempt on the basis of their intelligence.

A judicially created exemption from capital punishment gives little additional protection to those for whom the death penalty would be clearly unjust. The insanity defense, competency to stand trial, and the prohibition against executing the insane all protect the most retarded defendants from capital punishment. Further protection is provided through the defendant's right to present evidence of mental retardation as mitigating evidence and to have the jury instructed to consider it in mitigation. Only those defendants who could not other-

wise avoid a death sentence would benefit from overturning *Penry I* and *Stanford*. Treating all mentally retarded defendants as one undifferentiated mass also contradicts the principle of individualized sentencing.

In the event that the defendant's claim is accepted, then the rules and procedures for determining mental retardation should be governed by due process rather than the Eighth Amendment. If the Eighth Amendment governs, then any rule favorable to the prosecution that varies from the norm will be attacked under the "evolving standards of decency" test. Since states can freely depart from the majority rule to favor the defense, Eighth Amendment scrutiny will lead state rules to a lowest common denominator in favor of the defendant. What must be avoided is invoking the Eighth Amendment to force a procedure on the states, which have not written any rules on the subject, or, even worse, to craft a judicially created set of procedures and use them to attack the very statutes that created the "consensus" for the underlying rule in the first place.

This threat is all too real. State statutes used as examples of the evolving standards of decency in one case were successfully attacked in later cases as violating some newer standard. Since there is considerable variation among current state procedures governing retardation exemptions, there will be many opportunities for Eighth Amendment litigation.

Due process allows the state experimentation that is the hallmark of our federalism. It is also how this Court treats procedures governing the prohibition against executing the insane. The best way to preserve federalism and keep courts from being inundated with even more Eighth Amendment claims is to adopt the deferential due process standard.

ARGUMENT

I. The Court should not unsettle its capital punishment jurisprudence at this late stage.

From its fractured origins in *Furman* v. *Georgia*, 408 U. S. 238 (1972), this Court's capital punishment jurisprudence has matured into a comparatively stable body of law. Although tensions remain, legislatures now have a good idea how to write constitutional death penalty statutes, and courts know how to apply them.

Accepting the defendant's arguments would needlessly upset this system. In order to categorically exempt from capital punishment any person who tests as mentally retarded, the Court must overrule important parts of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) and *Stanford* v. *Kentucky*, 492 U. S. 361 (1989). Nothing in this case warrants such a disruption of the important and complex body of law surrounding capital punishment. Defendant's desired result will provide little additional aid to those for whom the death penalty is clearly unjust, but it would entail considerable cost. Since there is no "special justification" for departing from these precedents, cf. *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000) (internal quotation marks omitted), *Penry* and *Stanford* should not be overruled.

A. The Legacy.

Few areas of constitutional law have been as contested or as complex as modern capital punishment jurisprudence. Starting with *Furman* v. *Georgia*, *supra*, the longest and one of the most divided opinions in the United States Reports, see Steiker & Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 Harv. L. Rev. 355, 362 (1995), this Court's death penalty opinions have followed a labyrinthine path to the current, comparatively settled body of law. These opinions have created a unique set of procedures for capital cases that "are extensive

and complex." 5 W. LaFave, J. Israel, & N. King, Criminal Procedure § 26.1(b), p. 698 (2d ed. 1999). While these procedures may now strike an appropriate balance between Eighth Amendment interests and respect for state criminal justice systems, see Bilionis, Legitimating Death, 91 Mich. L. Rev. 1643, 1680 (1993), this equilibrium came at considerable cost. In addition to its complexity, the torturous path from *Furman* has burdened society with the needless retrial or release of some of our worst criminals, burdened federalism in a crucial area, and at times has promoted the very arbitrariness condemned by *Furman*. Any major expansion of the death penalty defendant's Eighth Amendment rights would reopen this can of worms. At this stage, there is no need to reinflict the wounds of the last 30 years.

A substantial cost of developing modern death penalty law is the difficulty of figuring it out and complying with it. The law's complexity is a weapon for capital defendants to frustrate their deserts. See *Richmond* v. *Lewis*, 506 U. S. 40, 54 (1992) (Scalia, J., dissenting). It also harms capital defendants by restricting the pool of available lawyers. "[T]he jurisprudence of death is so complex, so esoteric, so harrowing, this is one area where there aren't nearly enough lawyers willing and able to handle all the current cases." Kozinski & Gallagher, For an Honest Death Penalty, N. Y. Times, Mar. 8, 1995, p. A21, col. 1.

Developing such extensive regulations carries other costs as well. Courts and legislatures have had considerable difficulty in applying these decisions and in anticipating developments in death penalty law. An obvious example is found in the initial reaction to *Furman*. *Furman* provided very little guidance to state legislatures on how to write capital punishment statutes that complied with the Eighth Amendment. "But identifying the 'concerns' of *Furman* is a daunting task . . . . The opinions presented a staggering array of arguments for and against the constitutionality of the death penalty and offered little means, aside from shrewd political prediction of determining which

arguments would dominate in the decision of any future cases." Steiker & Steiker, *supra*, 109 Harv. L. Rev., at 362. "Predictably, the variety of opinions supporting the judgment in *Furman* engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." *Lockett* v. *Ohio*, 438 U. S. 586, 599 (1978) (plurality). Responding to the concern with arbitrariness that ran through the *Furman* opinions, see *Graham* v. *Collins*, 506 U. S. 461, 483 (1993) (Thomas, J., concurring) (summarizing opinions), several states enacted mandatory death penalty statutes in order to foreclose arbitrariness. See *Lockett*, *supra*, at 599-600. Four years after *Furman*, this Court decided that these states were wrong, invalidating their mandatory statutes and striking down numerous death sentences. See *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976); *Roberts* v. *Louisiana*, 428 U. S. 325, 336 (1976). This result was itself arbitrary. Given no real guidance, several state legislatures simply guessed wrong as to what this Court would require. As a result, numerous deserving defendants avoided their punishment, as all existing death sentences in these states were wiped out for the second time in four years. Each additional layer of complexity added to capital jurisprudence carries the risk of similar arbitrariness as defendants' punishments are determined by the ability of courts and legislatures to predict the next twist in this winding road.

Unfortunately, there are many other examples of the disruption caused by the development of the Eighth Amendment death penalty jurisprudence. The *Lockett* plurality sought to give "the clearest guidance that the Court can provide" through its holding. 438 U. S., at 602. Few promises from this Court have been less fulfilled. Its premise, that the sentencer in capital cases must not be prevented "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense," *id.*, at 605, opened a Pandora's box for the legislatures, courts, and prosecutors left to implement it.

The explosive growth of *Lockett*'s individualized sentencing branch of the post-*Furman* cases is well documented. See, *e.g.*, McAllister, The Problem of Implementing a Constitutional System of Capital Punishment, 43 Kan. L. Rev. 1039, 1057-1060 (1995) (describing cases); *id.*, at 1065 ("the virtually limitless expansion of the individualized sentencing principle"). *Lockett*, and this Court's numerous interpretations of its principles, see, *e.g.*, 5 W. LaFave, J. Israel, & N. King, *supra*, § 26.1(b), at 700, n. 17, led to the reversal of many death sentences where legislatures and courts failed to anticipate these sudden shifts in the Court's death penalty law. Since the *Lockett* "Court did not attempt to define the range of mitigating evidence encompassed by the individualization requirement," see Steiker & Steiker, *supra*, 109 Harv. L. Rev., at 390, years of "intricate litigation over states' fulfillment" of it was inevitable. See *ibid.* The result was a morass of confusion, reversals, and retrials. CJLF's survey of habeas reversals of state capital cases in the Eleventh Circuit found *Lockett* to be the single largest source of the reversals. See K. Scheidegger, Rethinking Habeas Corpus 36 (1989), reprinted in Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 1st Sess. 212, 251 (1991).

These and other reversals led to numerous expensive retrials. Many capital defendants subsequently escaped their sentence, whether from unsuccessful attempts at retrial or the wholesale invalidation of state death penalty schemes. In addition to frustrating the will of many juries, this also cost innocent people their lives. "The death penalty does, however, undeniably serve as a deterrent in one respect: once the sentence is carried out, the recidivism is quite low. And, the simple fact is, people sentenced to life in prison without parole, or even to a death sentence, do, occasionally, get out and do it again." Kozinski & Gallagher, Death: The Ultimate Run-On Sentence, 46 Case W. Res. L. Rev. 1, 25 (1995).

Federalism also paid a heavy price for establishing *Furman*'s legacy. Criminal law is primarily a state matter. See, *e.g.*, *Payne* v. *Tennessee*, 501 U. S. 808, 824 (1991); *Argersinger* v. *Hamlin*, 407 U. S. 25, 38 (1972). By addressing the most serious crimes with the most serious penalty, capital punishment sits at the apex of a state's criminal justice system. While the Eighth Amendment has some hold over this most important part of criminal justice, see *Payne*, 501 U. S., at 824, the detailed set of regulations erected by this Court since *Furman* substantially limits legitimate state sovereignty. Besides the extensive regulations mandated by this Court, federalism is further impaired by the state legislatures' understandable overreaction to these decisions. Thus, "the Court's emerging doctrine has motivated every death penalty jurisdiction to permit the introduction and consideration of 'any' mitigating factor," see Steiker & Steiker, *supra*, 109 Harv. L. Rev., at 391, even though the Eighth Amendment does not actually require this. See, *e.g.*, *Walton* v. *Arizona*, 497 U. S. 639, 652 (1990) ("there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and equitable administration of the death penalty") (internal quotation marks omitted); *Boyde* v. *California*, 494 U. S. 370, 377 (1990). Having been burned many times before, states are afraid to conduct the experimentation in this field that forms the heart of federalism.

Many of these costs have now been paid. The uncertainty and instability that plagued much of the post-*Furman* era is nearly gone. In its place is a mature, stable body of law. With regard to its narrowing requirement, "[t]he relevant Eighth Amendment law is well-defined." *Richmond* v. *Lewis*, 506 U. S. 40, 46 (1992). Similarly, for the individualized sentencing requirement, cases like *Boyde* v. *California*, *supra*, *Saffle* v. *Parks*, 494 U. S. 484 (1990), and *Blystone* v. *Pennsylvania*, 494 U. S. 299 (1990), have "brought a measure of formulaic simplicity to this concern as well." Bilionis, *supra*, 91 Mich. L. Rev., at 1653-1654. Since all the states now freely

admit mitigating evidence, "virtually all of the current litigation concerning the individualization requirement is backward-looking, gauging the constitutionality of statutory provisions and state practices that are no longer in force." Steiker & Steiker, *supra*, 109 Harv. L. Rev., at 390. Even the famous tension between these two lines may be abating. Justice Thomas has sketched out a compromise position between these competing requirements. See *Graham*, 506 U. S., at 498-499 (Thomas, J., concurring). Although it involves an admittedly narrow reading of the *Lockett-Eddings* line, *id.*, at 490, it is consistent with the spirit of *Furman*.

The long road from *Furman* has reached a balance between the need to insure that capital punishment is enforced both rationally and equitably and the states' legitimate interest in enforcing the death penalty. This achievement has come at considerable cost, and should not be disturbed without substantial justification. As the next section demonstrates, accepting the defendant's arguments would cause such a disturbance.

B. The Cost.

Creating a constitutional categorical exemption from capital punishment for mental retardation carries considerable costs. It would involve a disregard for precedent, a disruption of capital sentencing schemes, the creation of additional complexity, and the attendant arbitrariness that is all too similar to the turmoil associated with the aftermath of *Furman* v. *Georgia*. Any decision concerning the defendant's request must take these costs into account.

1. Precedent.

The clearest cost of a *per se* exemption from capital punishment for mental retardation is the damage to precedent. In *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) (*Penry I*), this Court declined to create this categorical exemption from the death penalty. Since only two states prohibited executing the

mentally retarded there was no national consensus that required extending that ban to all other states. See *id.*, at 334.

Penry I's analysis still holds. It is true that more states now bar the execution of the mentally retarded than when *Penry I* was decided. But even the defendant's claim that 18 states with capital punishment and the federal government now bar the execution of the retarded does not support a different result. While it is possible to forge a new consensus under the "evolving standards of decency" strand of Eighth Amendment analysis, the defendant bears a "heavy burden" of establishing a consensus against a practice. See *Stanford* v. *Kentucky*, 492 U. S. 361, 373 (1989).

The defendant has not met that burden. His requested change instead is revolutionary, not evolutionary. *Penry I* and other cases demonstrate that the consensus of other state legislatures must be overwhelming before the few remaining states are forced to conform. It noted that when this Court held that the Eighth Amendment forbids executing the insane, no state permitted that practice. See *Penry I*, 492 U. S., at 334; *Ford* v. *Wainwright*, 477 U. S. 399, 408, n. 2 (1986). *Stanford* reinforces the importance of proceeding cautiously when evaluating a claim that national consensus against some punishment has reached constitutional proportions. In deciding that the Eighth Amendment did not bar executing someone who was 16 or 17 when the crime was committed, this Court held that 15 states with capital punishment forbidding this practice did "not establish the degree of national consensus" to support a finding of cruel and unusual punishment. *Stanford*, 492 U. S., at 371. As the *Stanford* Court noted, prior examples of striking down a practice under the national consensus theory had an overwhelming majority of states opposed to the relevant practice. The four examples given by the *Stanford* Court of an appropriate national consensus had either no state applying the relevant punishment, see *Ford*, 477 U. S., at 408 (insanity), only one state applying it, see *Coker* v. *Georgia*, 433 U. S. 584, 595-596 (1977) (plurality) (rape of adult woman); *Solem* v.

Helm, 463 U. S. 277, 300 (1983) (life without possibility of parole for minor offense), or eight states utilizing the punishment, see *Enmund* v. *Florida*, 458 U. S. 782, 792 (1982) (death for robbery in which accomplice kills). See *Stanford*, 492 U. S., at 371. Similarly, this Court has indicated that even if a majority of states followed a practice, that practice was not necessarily imposed on the other states under the Eighth Amendment. See *Spaziano* v. *Florida*, 468 U. S. 447, 464 (1984).

Amicus suggests that any national consensus must be at least as pervasive as in *Enmund* before it can be considered for being enshrined in the Eighth Amendment. Although this Court makes the final determination under the Eighth Amendment, the judgments of state legislatures and courts will "weigh heavily in the balance . . . ," see *Enmund*, 458 U. S., at 797, because there are no other appropriate indicators for this amorphous standard. If "emerging national consensus" is to mean something other than a byword for the Justices' own preferences, then the opinions of state legislatures must be listened to as the best objective source available. However, federalism and the integrity of state punishment systems both counsel against the aggressive use of such evidence.

Ordinarily, the Constitution does not impose a uniform approach by the states to any particular problem. Allowing a state to deviate from the majority rule of the other states is a hallmark of our federalism. Thus, "the Due Process Clause has never been perverted so as to force upon the forty-eight States a uniform code of criminal procedure." *Carter* v. *Illinois*, 329 U. S. 173, 175 (1946). As Justice Brandeis' famous dissent noted, each individual state must be allowed to serve as "a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting).

Counting noses among the state legislatures and routinely forbidding those practices which come a few votes short threatens innovation by punishing states for varying from the

norm. Except for extraordinary circumstances like the reaction to *Furman*, see Scheidegger, Capital Punishment in 1987: The Puzzle Nears Completion, 15 West. St. L. Rev. 95, 107 (1987), any finding by this Court that there is an emerging consensus against a particular practice is likely to be irreversible. A state wishing to reverse such a finding by forming a new consensus will be in a bind, as any sentences imposed contrary to the newly found consensus would be quickly struck down. Unless a considerable number of states act in concert to reverse the consensus, this Court's decision to strike down a particular practice is likely to stick.

This problem is compounded by the fact that the emerging national consensus doctrine can only be used to strike down sentences. States may freely vary from the consensus and forbid a punishment or procedure favored by most states. The reaction of some state legislatures to *Penry I* is one example. While the Eighth Amendment may forbid a punishment, it will not mandate states to act more harshly against offenders. Therefore, an aggressive use of the national consensus doctrine would lead to a rapid race to minimize punishments and impose procedural restraints upon the states. While punishments could be easily struck down, innovations favoring punishment would be hard to introduce and previously struck-down punishments would be almost impossible to rehabilitate. For example, Nevada's attempt to test *Woodson*'s limits by enacting a mandatory death sentence for murder by a life-term inmate was struck down in *Sumner* v. *Shuman*, 483 U. S. 66, 77-78 (1987). Any attempt to restore this innovation would require numerous states to act in concert. A state that wishes to act alone in having a mandatory death sentence for repeat murderers will be stymied in court. Such a system is thus not simply a burden to federalism, but also threatens the entire capital punishment system. Requiring an overwhelming consensus to invalidate a practice places an important limit on a potentially dangerous doctrine.

The defendant has not found this consensus. According to his figures, only 18 of the 38 states with capital punishment exempt the mentally retarded. See Brief for Petitioner 39.[2] Even adding the federal government to the "anti"side does not change the fact that a majority of the jurisdictions with capital punishment do not categorically exempt the mentally retarded. Even this addition is dubious. The federal standard for mental retardation is "lacks the mental capacity to understand the death penalty and why it was imposed on that person." 18 U. S. C. § 3596(c). This is the *Ford* competency standard applied to mental retardation. See *Penry I*, 492 U. S., at 333. Accepting the defendant's argument would require another standard. Since the defendant cannot even muster a majority of the states against his sentence, let alone a supermajority, his argument fails under *Penry* and *Stanford*.

Implicitly recognizing the weakness of his position, the defendant attempts to bolster his cause by invoking an argument previously rejected by this Court. His attempt to add the 12 states banning the death penalty to his total in order to find a majority for a categorical exclusion, see Brief for Petitioner 39, contradicts *Stanford*. The *Stanford* Court specifically rejected the relevance of counting the anti-death penalty states in any consensus concerning the administration of capital punishment. See 492 U. S., at 370, n. 2. Try as he might, the defendant cannot properly characterize this rejection as dicta. See Brief for Petitioner 39, n. 44. The difference between *Stanford* and the present case is small, with 15 states opposing executing juvenile offenders in *Stanford* and 18 opposed to executing the retarded in the present case. Adding the states opposed to the death penalty shrinks the difference between *Stanford* and this case, since two fewer states now prohibit the death penalty than when *Stanford* was decided. Compare

2. Virginia properly contests this number. See Brief for Respondent, Part II B. Even if the defendant's count is accepted, he still has not forged a consensus as defined in *Stanford*.

Stanford, 492 U. S., at 371, n. 2, with Brief for Petitioner 39. Since the jurisdiction count in the two cases is essentially the same, finding a consensus against executing the retarded in this case would at the very least require overruling the analysis used in *Stanford*.

2. Disruption.

Accepting the defendant's claim would also cause considerable disruption to state capital punishment systems. *Penry I* held that a categorical exemption from punishment for mental retardation would apply retroactively on collateral review under the first exception to *Teague* v. *Lane*, 489 U. S. 288 (1989), even though it would be a new rule. See *Penry I*, 492 U. S., at 330. Unless this holding of *Penry I* were also overruled, every death row inmate who presented at the penalty phase at least some evidence that he was retarded would be entitled to a new trial to determine whether he was now exempt from his death sentence. This only begins the disruption. Because retardation claims would apply retroactively on federal habeas, they would also be exempt from limits on successive habeas petitions or on default for failing to develop facts in state court. See 28 U. S. C. §§ 2244(b)(2)(A), 2254(e)(2)(A)(i). Therefore, *any* death row inmate could try to raise a retardation claim on federal habeas. Since a diagnosis of retardation is more subjective and therefore more subject to falsification than a diagnosis of the measles, the federal and state courts risk being inundated by the claims of death row inmates utilizing a new weapon in their arsenal of delay. As in the aftermath of *Furman*, many well-deserved death sentences would be set aside. See *supra*, at 10. Even in cases where the malingerers are identified as such, the process will further delay the already overdue process of capital punishment.

3. Complexity.

Any change from the current treatment of mental retardation will complicate death penalty procedure. Retardation is now treated like any other form of specialized mitigating evidence. The defense presents its claim to the jury through expert witnesses, and the prosecution attempts to rebut through cross-examination and its own experts. See, *e.g.*, J. A. 617-619.

Under the defendant's new regime, courts and legislatures would now have to craft a definition of mental retardation separate from the legal definition of insanity. "Mental age" is unacceptable since IQ scores usually stop rising after 16. See *Penry I*, 492 U. S., at 339. Since the average mental age is 16 years, eight months, any standard that defines the average criminal defendant as a juvenile is unacceptable. See *In re Ramon M.*, 22 Cal. 3d 419, 429, 584 P. 2d 524, 531 (1978). Simple IQ is no better. As the defendant's expert acknowledged, a diagnosis of retardation cannot be based solely upon IQ score, but also involves the individual's inability to function independently. See J. A. 618; accord American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000, text revision) ("DSM IV-TR"). The inability to function criterion involves "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, homeliving, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." DSM IV-TR at 41. These skill assessments may be given much greater weight than raw IQ scores in certain cases. See *id.*, at 42. Thus, individuals with IQ scores above the retarded level may be diagnosed as retarded while those with scores below the retarded level can be classified as not retarded on the basis of their adaptive behavior. See *ibid.* Any standard must incorporate this subjective determination into a legal standard. Cf. *id.*, at xxxvii (recognition as a diagnostic category does not imply that the condition meets legal criteria).

This new standard will be accompanied by a new finding. At the very least, the sentencer must be given the option of rendering a separate verdict of mentally retarded. Since the issue of retardation will now be divorced from the defendant's overall culpability, a separate hearing will probably be necessary in order to minimize juror confusion. Accompanying the new standards and hearings will be many additional state procedures. While these procedures should not be federalized beyond basic due process, see part II, *infra*, the additional rules and procedures will further complicate an already complex body of law.

4. Arbitrariness.

Finally, judicially creating an exemption for mental retardation claims injects arbitrariness into the death penalty. The disruption associated with the change creates its own arbitrariness. As in the aftermath of *Furman*, *Lockett*, or *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), the death penalty will not be rendered just on the basis of desert, but will also be influenced by how well state legislatures and courts anticipate the newest pronouncements from this Court. This is itself arbitrary and was a significant cost of the development of the law from *Furman*. See *supra*, at 9. Accepting the defendant's claim will reopen some of these wounds.

Determining who is mentally retarded also adds randomness to capital punishment. False positives are a common problem in mental retardation testing. Cultural bias is one likely culprit. See Garcia & Steele, Mentally Retarded Offenders in the Criminal Justice System and Mental Retardation Services in Florida: Philosophical Placement and Treatment Issues, 41 Ark. L. Rev. 809, 815 (1988). This is a particular problem for poor people and ethnic minorities. See *ibid.* Thus, while "several studies show mentally retarded offenders are disproportionately members of minority/ethnic groups . . . . [m]ost authors acknowledge the meaningfulness of this data must be tempered by consideration of cultural biases in the tests often

used to assess intelligence and by the effects of the offender's environment and cultural milieu." *Id.*, at 817-818; see also DSM IV-TR, *supra*, at 46 ("Care should be taken to ensure that intellectual testing procedures reflect adequate attention to the individual's ethnic cultural or linguistic background.").

There can be no greater affront to the principles of *Furman* than having the death penalty determination influenced by race or class. Although the bias in intelligence testing favors those traditionally thought to be disadvantaged in capital punishment, two wrongs do not make a right. The race-based arbitrariness that motivated *Furman*, see *Graham* v. *Collins*, 506 U. S. 461, 479 (1993) (Thomas, J., concurring) should not be reintroduced by this Court, even in an allegedly more benign form. While it may be impossible to eliminate all arbitrariness in any human endeavor, this Court should avoid injecting unnecessary caprice, particularly with regard to class or race, into capital sentencing.

C. The Bargain.

Establishing a new judicially created categorical exemption from capital punishment for those who successfully claim that they are mentally retarded is unnecessary. The current system protects those for whom a death sentence would be clearly unjust. The most retarded are unlikely to be competent to stand trial. See *Dusky* v. *United States*, 362 U. S. 402 (1960) (*per curiam*). The insanity defense provides further protection. *Ford* v. *Wainwright*, 477 U. S. 399 (1986) also protects the most retarded from the death penalty. See *Penry I*, 492 U. S., at 333. The rule proposed in the present case is not needed to protect the most severely mentally retarded.

The defendant's proposal is for the marginal cases—the mildly or moderately retarded and, inevitably, the malingering. These are people who are capable of understanding the wrongfulness of their conduct. See *Penry I*, 492 U. S., at 338 (O'Connor, J., concurring). Thus, as even the defendant's

expert admitted, the defendant knew that it was wrong to shoot Nesbitt. See J. A. 618.

Since a categorical retardation exemption would only benefit those in the gray zone, it is unsurprising that the cases raising this claim typically involve defendants whose claim to retardation is hotly disputed. See, *e.g.*, J. A. 618-619; see Supplement to Joint Appendix in *McCarver* v. *North Carolina*, No. 00-8727, p. 160sa (cert. dismissed as improvidently granted); Brief for Respondent in *Penry* v. *Johnson*, No. 00-6677, pp. 6-7. These defendants already have the benefit of presenting their alleged retardation as mitigating evidence to the sentencer, and having the sentencer instructed to consider it. See *Penry* v. *Johnson*, 532 U. S. 782, 150 L. Ed. 2d 9, 25, 121 S. Ct. 1910, 1920-1921 (2001) (*Penry II*). As with the more severely retarded, the most deserving retarded defendants will avoid the death sentence at the penalty phase when the sentencer relies on the mental retardation to mitigate the sentence. The defendant's claim that sentencing juries may not be able to appreciate the mitigating effect of mental retardation, see Brief for Petitioner 34-35, is why this evidence is presented through expert testimony. *Amicus* knows of no other evidence that is placed beyond every jury's grasp because it is too complex even with expert testimony.

The defendant's proposal will only benefit those who claim to be retarded but cannot otherwise avoid capital punishment for their crimes. These will be defendants whose intelligence is borderline or whose crimes display exceptional cruelty outweighing that mitigation. In order to exempt these cases, this Court would have to undo the capital punishment system it has developed, and inflict again the disrespect for precedent, the disruption, the complexity, and the arbitrariness that came with *Furman*.

By treating the retarded as an undifferentiated mass, the categorical exemption would cause additional harm to the capital punishment system and the mentally retarded. The mentally retarded are not homogenous. "Mentally retarded

persons are *individuals* whose abilities and experiences can vary greatly." *Penry I*, 492 U. S., at 338 (opinion of O'Connor, J.) (emphasis added). "In light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said on the record before us today that all mentally retarded people, by definition can never act with the level of culpability associated with the death penalty." *Id.*, at 338-339. Therefore, "[n]o specific personality and behavioral features are uniquely associated with Mental Retardation." DSM IV-TR, *supra*, at 44.

Treating defendants as individuals is the foundation of the mitigating line of cases. The problem with a mandatory penalty statute is that "[i]t treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (plurality). Thus all repeat murderers must be treated as individuals, and cannot be subject to a mandatory death sentence. See *Sumner* v. *Shuman*, 483 U. S. 66, 85 (1987). A blind exemption from death is no better. If repeat murderers are to be treated as individuals, then so should the mentally retarded. The defendant's proposed exemption is an affront to the concept of individualized sentencing.

"So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination whether 'death is the appropriate punishment' can be made in each particular case." *Penry I*, 492 U. S., at 340 (O'Connor, J.). The intervening years have not altered this situation. See *supra*, at 16. The current treatment of mental retardation has not been eroded by subsequent developments, nor has it been difficult to use. Indeed, the categorical exemption will make the law more complex and harder to follow. See part I B 3. In short, there is no good reason to depart from precedent. See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854-855 (1992). In

a system where "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable," *id.*, at 854, the beneficial precedents of *Penry I* and *Stanford* should be retained. Given the great costs and small benefit of abandoning these cases, the treatment of mental retardation in capital cases should remain settled.

II. In the event that a categorical exemption for mental retardation is created, the rules and procedures governing that determination should be left to the states.

If this Court chooses to overturn portions of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) and *Stanford* v. *Kentucky*, 492 U. S. 361 (1989) and create a *per se* exemption from capital punishment for the mentally retarded, then it should still try to limit the damage to federalism. States should be allowed to write their own rules governing this issue without the prospect of a set of federally imposed, retroactively altered procedures lurking in the background. This is consistent with both the general deference accorded to the states' power to define their laws, and with this Court's treatment of the most similar circumstance brought before it. What must be avoided is invoking the Eighth Amendment to force the procedures of the states currently banning the execution of the retarded on those states which have not written any rules on that subject, or, even worse, to craft a judicially created set of procedures and use them to attack the very statutes that created the "consensus" for the underlying rule in the first place.

This has happened before. In *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), the Court favorably contrasted Florida's death penalty scheme with the North Carolina one struck down in *Woodson*. See *id.*, at 286-287 (plurality). Although it served as an exemplar in *Woodson*, the Florida scheme was not saved from attacks based on subsequent decisions that favored the defense. *Lockett* v. *Ohio*, 438 U. S. 586 (1978) extended

Woodson's individualization requirement into a broad right for the capital defendant to present virtually any type of mitigating evidence to the sentencer. See *id.*, at 604-605 (plurality). *Lockett* was then used to invalidate Florida's statutory limits on mitigating evidence. See *Hitchcock* v. *Dugger*, 481 U. S. 393, 399 (1987). The Eighth Amendment, as it is currently interpreted, is a slippery slope even for those states that provide the example of appropriate procedures.

Current statutory exemptions for the mentally retarded will provide plenty of fuel for litigation if the defendant's argument is accepted. For example, at least one state requires the defendant to prove mental retardation by clear and convincing evidence. See, *e.g.*, Colo. Rev. Stat. § 169-402(2). Any standard greater than a preponderance will be attacked. Similarly, states which limit claims to those defendants who have manifested mental retardation by a certain age, see, *e.g.*, Ark. Code § 5-4-618(a)(2); Md. Ann. Code, Art. 27, § 412(f)(3), will be attacked for improperly limiting the defense. Jurisdictions also vary considerably in how mental retardation is defined. See, *e.g.*, 18 U. S. C. § 3596(c) ("lacks the mental capacity to understand the death penalty and why it was imposed on that person"); Ark. Code § 5-4-618 ("[s]ignificantly subaverage intellectual functioning accompanied by significant deficits or impairments in adaptive functioning"); Ky. Rev. Stat. § 532.130(2) (IQ below 70). Any attempt to narrow the definition will be attacked. The possibilities for litigation are nearly endless if the Eighth Amendment is allowed to govern.

Having the Eighth Amendment govern the procedures for determining mental retardation claims will stifle state innovation in this field. The "evolving standards of decency," *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality), line of cases can place considerable pressure on states to conform to the current majority rule. Since this Court first looks to the views of other state legislatures in determining whether a practice offends the *Trop* standard, see *McCleskey* v. *Kemp*, 481 U. S. 279, 300

(1987), states that vary from the majority rule risk reversal of their sentences. See *supra*, at 15.

One way to alleviate this problem is to require at least an overwhelming majority of the states to condemn a particular practice before finding an Eighth Amendment violation. See *supra*, at 13-14. This safety net will be gone if this Court accepts a categorical exemption for mental retardation, since a majority of the states with capital punishment do not recognize that exemption. See *supra*, at 16. Removing the super-majority restraint from the "contemporary standards of decency" analysis could quickly constitutionalize the procedures for determining retardation claims. Any state procedures that varied from those adopted by the largest number of states would invite Eighth Amendment attack. The cost of litigation and threat of reversed sentences will give the states considerable incentives to conform to the broadest version of the procedures.

The Eighth Amendment should not bludgeon the states into procedural conformity on any issue. "The essence of federalism is that the states must be free to develop a variety of solutions to problems and not be forced into a common uniform mold." *Addington* v. *Texas*, 441 U. S. 418, 431 (1979). Although *Addington* addressed due process and the civil commitment procedures, the Eighth Amendment is not different. "To [accept the defendant's argument] would . . . place within constitutional ambit micromanagement tasks that properly rest within the State's discretion to administer its criminal justice system." *Harris* v. *Alabama*, 513 U. S. 504, 512 (1995). Therefore, the fact that a majority of the states follow a particular procedure does not require the other states to follow suit under the emerging national consensus standard. "The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws. . . . ¶ As the Court several times has made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme." *Spaziano* v. *Florida*, 468 U. S. 447, 464 (1984).

This Court showed similar deference when dealing with the execution of the allegedly insane. In *Ford* v. *Wainwright*, 477 U. S. 399, 401 (1986), it stated that executing the insane violated the Eighth Amendment. Since no state ever followed that practice, the real issue in *Ford* was what procedure the Constitution requires when a state is confronted with a claim of insanity by a death row inmate. See *id.*, at 431 (Rehnquist, J., dissenting). While a majority of the Court found fault with Florida's procedures, it also gave considerable deference to the states to implement their own standards for resolving insanity claims.

Thus, while the plurality sought some sort of adversarial hearing, see *id.*, at 417, the states would have considerable freedom in how to implement this directive. "[W]e leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Id.*, at 416-417. Justice Powell's concurrence is even more important. He noted that the real issue here was whether the Florida procedures "comport with the requirements of due process." *Id.*, at 424. He differed from the plurality on the extent of the necessary procedures. Justice Powell held that the plurality's "kind of full-scale 'sanity trial' " was unnecessary, and that due process could be satisfied by considerably less elaborate procedures. See *id.*, at 425. However, Justice Powell did not differ substantially from the majority in the deference accorded to the states' freedom to implement their own procedures. "Beyond [a few] basic requirements, the States should have substantial leeway to determine what process best balances the

various interests at stake." *Id.*, at 427. No more than "basic fairness" was required. See *ibid.*[3]

As the narrowest opinion, Justice Powell's opinion provides *Ford*'s holding. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977). If this Court accepts the defendant's arguments, then the Powell concurrence should govern. The procedures used to determine claims of mental retardation should only have to satisfy due process. If it chooses, a state may adopt procedures similar to those used in determining competency to stand trial, see *Ford*, 477 U. S., at 417, n. 4 (plurality), but no particular procedures are required. Since the defendant has already been found guilty and competent to stand trial, the state should be allowed to require the defendant to prove his mental retardation by clear and convincing evidence. Cf. *id.*, at 426, and n. 6 (Powell, J., concurring). States should also have broad latitude to define retardation, including as a minimum the definitions in *any* of the statutes used to form the "consensus."

Fashioning an exemption from execution for mental retardation will place additional stress on state capital punishment systems. Capital defendants will have considerable incentive to abuse this hard-to-define but potentially very strong defense. Elaborate, constitutionally mandated procedures will threaten to overwhelm capital trials and appeals with more unwanted complexity. Even those states that currently exempt the mentally retarded will see their systems subjected to Eighth Amendment attack. Federalism in this most important aspect of criminal law will take yet another blow. The best way to minimize these and other problems is to give the states the considerable flexibility afforded by due process.

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3. Justice O'Connor's concurrence and dissent held that while there was no Eighth Amendment exemption from execution for insanity, Florida law created a "protected liberty interest in avoiding execution while incompetent," which Florida did not adequately protect. See *id.*, at 427. While this mode of analysis is not particularly relevant to the present case, the opinion also gave the states "broad latitude" to satisfy due process. See *id.*, at 429.

CONCLUSION

The decision of the Virginia Supreme Court should be affirmed.

January, 2002

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari to the
Supreme Court of Virginia

BRIEF OF THE STATES OF ALABAMA, MISSISSIPPI, NEVADA, SOUTH CAROLINA, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment?

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Missouri (§ 565.030, R.S.Mo. (2001)) 3
Missouri (§ 565.030.4(1) R.S.Mo. (2001)) 14
Missouri (§ 565.030.5 R.S.Mo. (2001)) 16
Missouri (§ 565.030.6 R.S.Mo. (2001)) 10, 11, 13
Missouri (§ 565.030.7 R.S.Mo. (2001)) 17

Nebraska (R.R.S. Neb. § 28-105.01(3) (1998)) ... 7, 9, 10, 12

Nebraska (R.R.S. Neb. § 28-105.01 (1998)) 3, 12

Nebraska (R.R.S. Neb. § 28-105.01(4) (1998)) 18

Nebraska (R.R.S. Neb. § 28-105.01(5) (1998)) 14, 16

New Mexico (N.M. Stat. Ann. § 31-20A-2.1(A) (1991)) 7, 9, 10, 12

New Mexico (N.M. Stat. Ann. § 31-20A-2.1 (1991)) 12, 19

New Mexico (N.M. Stat. Ann. § 31-20A-2.1(C) (1991)) 14, 16

New Mexico (N.M. Stat. Ann. §31-20A-2.1 (1991)) 3

New York (NY CLS CPL § 400.27(12)(d) (1995)) 20

New York (NY CLS CPL § 400.27(12)(e) (1995)) 10, 13

New York (NY CLS CPL § 400.27 (1995)) 3, 9, 12, 17

New York (NY CLS CPL § 400.27(12)(a) (1995)) 14, 17

New York (NY CLS CPL § 400.27(12)(c) (1995)) 17

North Carolina (N.C.G.S.A. § 15A-2005 (2001)) 3

North Carolina (N.C.G.S.A. § 15A-2005(2)(c) (2001)) 14

North Carolina (N.C.G.S.A. § 15A-2005(2)(e) and (f) (2001)) 15

North Carolina (N.C.G.S.A. § 15A-2005(a)(1)(a) (2001)) 10, 13

North Carolina (N.C.G.S.A. § 15A-2005(a)(1)(b) (2001)) 11

North Carolina (N.C.G.S.A. § 15A-2005(a)(1)(c) (2001)) 8

North Carolina (N.C.G.S.A. § 15A-2005(c) and (e) (2001)) 16

North Carolina (N.C.G.S.A. § 15A-2006(2) (2001)) 18

South Dakota (SDCL § 23A-27A-26 (2000)) 3

South Dakota (SDCL § 23A-27A-26.1 (2000)) 12, 13, 19

South Dakota (SDCL § 23A-27A-26.2 (2000)) 9, 10

South Dakota (SDCL § 23A-27A-26.3 (2000)) 14, 16

Tennessee (Tenn. Code. Ann. § 39-13-203 (1990)) 3, 12, 18

Tennessee (Tenn. Code. Ann. § 39-13-203(a)(1) (1990)) 8

Tennessee (Tenn. Code. Ann. § 39-13-203(a)(2) (1990)) 10

Tennessee (Tenn. Code. Ann. § 39-13-203(a)(3) (1990)) 13

Tennessee (Tenn. Code. Ann. § 39-13-203(c) (1990)) 14

Tennessee (Tenn. Code. Ann. § 39-13-203(c) and (e) (1990)) 16

Washington (WA ST § 10.95.030 (1993)) 3, 19

Washington (WA ST § 10.95.030(2) (1993)) 14, 16

Washington (WA ST § 10.95.030(2)(a) (1993)) 10

Washington (WA ST § 10.95.030(2)(c) (1993)) 8

Washington (WA ST § 10.95.030(2)(d) (1993)) 10

Washington (WA ST § 10.95.030(2)(e) (1993)) 13

Other Authorities

Constitution of California of 1879,
Art. 1, § 27 (Added Nov. 7, 1972) 23

MASS. GEN. LAWS CONST.,
Pt. 1, Art. 26 (Amended 1982) 23

Webster's New International Dictionary
Unabridged (3rd ed. 1993) 20

INTEREST OF *AMICI CURIAE*

The States of Alabama, Mississippi, Nevada, South Carolina, and Utah and the Attorney General of Alabama, Bill Pryor, respectfully submit this brief as *amici curiae*, pursuant to Sup. Ct. R. 37.4, because of their fundamental interest in preserving the applicability of the death penalty to all capital defendants who have "the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." *Penry v. Lynaugh*, 492 U.S. 302, 338 (1989). *Amici* belong to the majority of death penalty states that have followed *Penry*, not by imposition of a blunt per se rule, but rather by the enactment of various statutes allowing capital defendants to present evidence of limited mental capacity in the course of trial and sentencing. *Amici* believe that this sort of regime is a just and sensitive way to give substance to *Penry*, while at the same time ensuring that their laws are vigorously enforced. *Amici*, therefore, ask this Court not to overturn the various state statutes addressing the execution of the mentally retarded and to reaffirm *Penry*.

SUMMARY OF ARGUMENT

Petitioner Atkins urges this Court to replace *Penry v. Lynaugh*, 492 U.S. 302 (1989), with a per se constitutional rule prohibiting execution of any capital defendant found to be mentally retarded. To do so, however, petitioner bears the "heavy burden" of establishing that there is a national consensus against the execution of the mentally retarded. *Stanford v. Kentucky*, 492 U.S. 361 (1989) (*quoting Gregg v. Georgia*, 428 U.S. at 175). Petitioner cannot meet this burden. Of the thirty-eight states, that currently authorize the death penalty, only eighteen have

expressly prohibited the execution of those mentally retarded individuals who satisfy the varying requirements of the individual state statutes. The majority (twenty), including *amici*, have followed *Penry*, not by imposition of a categorical rule, but rather by affording capital defendants multiple opportunities in the course of trial and sentencing to present evidence of limited mental capacity.

Even among the eighteen states that prohibit execution of the mentally retarded, there is significant disagreement about the appropriate definition of mental retardation and the proper burden of proof that a capital murderer must satisfy before he or she can be deemed mentally retarded. The states further disagree as to whether the trial court or the jury should be responsible for determining if a capital murderer is mentally retarded and as to when such a determination should be made. The states also disagree about whether their statutes should be applied prospectively or retroactively.

In short, our nation simply has not reached a state of moral consensus on the issue of mental retardation that can be reasonably interpreted and applied by this Court as an "evolving standard[ ] of decency that mark[s] the progress of a maturing society." *Penry*, 492 U.S. at 331. The states continue to experiment with a variety of statutory regimes as they attempt to ensure that the death penalty is applied in an even-handed manner to those who truly have "the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." *Penry*, 492 U.S. at 338. *Amici* urge this Court not to erase the states' careful efforts to address this delicate issue and to reaffirm the principles set forth in *Penry*.

ARGUMENT

I. AN EXAMINATION OF THE EIGHTEEN STATUTES THAT PROHIBIT OR RESTRICT THE EXECUTION OF THE MENTALLY RETARDED DEMONSTRATES THE LACK OF A NATIONAL CONSENSUS CATEGORICALLY PROHIBITING THE EXECUTION OF MENTALLY RETARDED INDIVIDUALS.

In Issue II of his brief, Atkins contends that a national consensus against the execution of the mentally retarded has emerged since this Court issued its decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989). (Brief for Pet. at 37-41) To support this contention, Atkins relies, in part, on the fact that, although only two states[1] prohibited the execution of the mentally retarded at the time this Court decided *Penry* in 1989, sixteen additional states[2] have now enacted statutes prohibiting or restricting the execution of the mentally retarded. Without addressing

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1 Georgia (O.C.G.A. § 17-7-131 (1988)); Maryland (Md. Ann. Code art. 27 § 412 (1989)).

2 Arizona (A.R.S. § 13-703.02 (2001)); Arkansas (Ark. Stat. Ann. § 5-4-618 (1993)); Colorado (C.R.S. § 16-9-401 (1993)); Connecticut (C.G.S.A. § 53a-46a(h)(2) (2001)); Florida (West's F.S.A. § 921.137 (2001)); Indiana (IN ST § 35-36-9-6 (1994)); Kansas (K.S.A. § 21-4623 (1994)); Kentucky (KRS § 532.130 (1990)); Missouri (§ 565.030, R.S.Mo. (2001)); Nebraska (R.R.S. Neb. § 28-105.01 (1998)); New Mexico (N.M. Stat. Ann. §31-20A-2.1 (1991)); New York (NY CLS CPL § 400.27 (1995)); North Carolina (N.C.G.S.A. § 15A-2005 (2001)); South Dakota (SDCL § 23A-27A-26 (2000)); Tennessee (Tenn. Code Ann. §39-13-203 (1990)); Washington (WA ST § 10.95.030 (1993)).

the content of these statutes, Atkins asserts that this development establishes the existence of a national consensus against the execution of mentally retarded individuals. (Brief for Pet. at 38-39)

In *Penry v. Lynaugh*, this Court held that the Eighth Amendment does not categorically prohibit the execution of the mentally retarded. *Penry*, 492 U.S. 302, 333-335 (1989). Emphasizing that "[t]he prohibition against cruel and unusual punishments also recognizes the 'evolving standards of decency that mark the progress of a maturing society,' " this Court noted that it "has looked to objective evidence of how our society views a particular punishment today" in order to discern those "evolving standards." *Id.* at 331. The *Penry* Court observed that legislation enacted by legislatures is the "clearest and most reliable objective evidence of contemporary values" and further noted that data relating to the actions of sentencing juries has been useful in such a determination as well. *Id.* This Court concluded that "the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of [an emerging] national consensus." *Id.* at 334.

This Court also considered and rejected an evolving standards of decency argument in *Stanford v. Kentucky*, 492 U.S. 361 (1989). In *Stanford*, the issue was "whether the imposition of capital punishment on an individual for a crime committed at 16 or 17 years of age constitutes cruel and unusual punishment under the Eighth Amendment." *Stanford*, 492 U.S. at 364-365. The *Stanford* Court noted that "it is the 'heavy burden' of petitioners, *Gregg v. Georgia*, 428 U.S. at 175, 96 S. Ct. at 2926, to establish a national consensus *against* it." *Id.* at

373. More specifically, this Court stated the following concerning whether the court's decision in *Stanford* established a national consensus against sentencing sixteen and seventeen-year-olds to death:

> Of the 37 states whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it upon 17-year-old offenders. This does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual. (footnote omitted)

Id. at 370-71. In addition, the *Stanford* Court emphasized that "[a] revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved." *Id.* at 377.

In the present case, Atkins contends that the "great weight of the evidence now demonstrates that American society overwhelmingly opposes" the execution of mentally retarded individuals. (Brief for Pet. at 38) In fact, Atkins argues that "[t]he consensus that has manifested in the last dozen years is also remarkable for the consistency with which it defines the class of people who should be protected from the death penalty." (Brief for Pet. at 41, FN. 50) Atkins fails to mention, however, that the statutes in these eighteen states differ sharply from one another both in substance and procedure. The argument that the enactment of these various, sharply differing statutes reveals the existence of a national consensus against the execution of mentally retarded capital murderers is, therefore, misleading.

Instead of discussing or analyzing any of these eighteen statutes, Atkins simply explains that a proper "clinical diagnosis" of mental retardation requires three separate findings, including "(1) psychometric verification and measurement of the severity of an individual's cognitive impairment; (2) a clinical determination that the impairment...has an actual disabling effect on the individual's ability to function in the everyday world; and (3) documentation that the onset of the disability occurred early in life." (Brief for Pet. at 20) Atkins further explains that "[e]ach of these three elements is an essential component of a professional diagnosis of mental retardation," and he notes the definitions of mental retardation developed by the American Association of Mental Retardation (AAMR) and the American Psychiatric Association (APA) to illustrate that both of the definitions contain all three of the elements which he deems to be "essential" to a proper definition of mental retardation. (Brief for Pet. at 20-21)

Although he does briefly discuss the AAMR and the APA definitions of mental retardation, Atkins does not explicitly argue that this Court should adopt any one particular definition of mental retardation. In fact, Atkins does not even ask this Court to set forth a clear standard by which states must evaluate claims of mental retardation in the context of a criminal proceeding. Moreover, Atkins fails to demonstrate that he is, in fact, able to satisfy the requirements set forth in any recognized definition of mental retardation.

A. The Eighteen States That Have Enacted Statutes Prohibiting Or Restricting The Execution Of The Mentally Retarded Do Not Agree On A Definition Of Mental Retardation.

All but two of these eighteen states specify that, in order to be deemed mentally retarded, an individual must demonstrate a significantly subaverage general intellectual functioning, deficits in adaptive behavior or adaptive functioning, and show that his or her mental retardation manifested itself or became apparent during his or her developmental period. Two of these states do not require, however, that an individual's mental retardation become apparent or manifest itself during his or her developmental period. Under Nebraska law, "mental retardation" is defined as a "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior." R.R.S. Neb. § 28-105.01(3) (1998). Under New Mexico law, "mentally retarded" is also defined as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior." N.M. Stat. Ann. § 31-20A-2.1(A) (1991). Nebraska and New Mexico are, therefore, missing one of the three elements that Atkins considers to be "essential" to a proper definition of mental retardation. (Brief for Pet. at 20-21)

Additionally, it should be noted that Kansas's statute addressing the execution of the mentally retarded is unique. Under Kansas law, "mental retardation" is defined as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from birth to age 18," but Kansas law defines "mentally retarded" as "having significantly subaverage general intellectual

functioning, as defined by K.S.A. § 76-12b01, to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of the law." K.S.A. § 76-12b01(d) (1994); § 21-4623(e) (1994). Unlike the other seventeen states, Kansas, therefore, requires that an additional element, namely the substantial impairment of one's capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law, be established before an individual can be deemed "mentally retarded."

In addition, an examination of the relevant statutes reveals that they sharply differ on the subject of the appropriate definition of these three elements. Between these eighteen states, there are a number of definitions of "significantly subaverage general intellectual functioning," "adaptive behavior" or "adaptive functioning," and "developmental period." In fact, some of these states have actually chosen not to set forth a definition of one, two, or even all three of these elements.

With respect to the "significantly subaverage general intellectual functioning" element, six states[3] define this element as an intelligence quotient of seventy (70) or below. Three states[4] define "significantly subaverage

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3 Arizona (A.R.S. § 13-703.02(J)(4) (2001)); Kentucky (KRS § 532.130(2) (1990)); Maryland (Md. Ann. Code art. 27, § 412(f)(3) (1989)); North Carolina (N.C.G.S.A. § 15A-2005(a)(1)(c) (2001)); Tennessee (Tenn. Code. Ann. § 39-13-203(a)(1) (1990)); Washington (WA ST § 10.95.030(2)(c) (1993)).

4 Connecticut (C.G.S.A. § 1-1g(b) (2001)); Florida (West's F.S.A. § 921.137(1) (2001)); Kansas (K.S.A. § 76-12b01(i) (1994)).

general intellectual functioning" as a "performance [on an intelligence quotient test] which is two or more standard deviations from the mean score on a standardized intelligence test." Two states[5] specify that an intelligence quotient of sixty-five (65) or below establishes a rebuttable presumption that an individual is mentally retarded. Two states[6] specify that an intelligence quotient of seventy (70) or below on a reliably administered intelligence quotient test is presumptive evidence that an individual is mentally retarded. One state[7] specifies that an intelligence quotient exceeding seventy (70) will be presumptive evidence that an individual is not mentally retarded. In addition, five states[8] have not set forth any definition of "significantly subaverage general intellectual functioning." An examination of these statutes, therefore, demonstrates that there is absolutely no consensus among these states with respect to how the "significantly subaverage general intellectual functioning" element should be understood and defined within a definition of mental retardation.

Although all eighteen states specify that there must be a showing of deficits in "adaptive functioning" or "adaptive behavior" before an individual can be deemed

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5 Arizona (A.R.S. § 13-703.02(F) (2001)); Arkansas (Ark. Stat. Ann. § 5-4-618(a)(2) (1993)).

6 Nebraska (R.R.S. Neb. § 28-105.01(3) (1998)); New Mexico (N.M. Stat. Ann. § 31-20A-2.1(A) (1991)).

7 South Dakota (SDCL § 23A-27A-26.2 (2000)).

8 Colorado (C.R.S. § 16-9-401 (1993)); Georgia (O.C.G.A. § 17-7-131 (1988)); Indiana (IN ST 35-36-9-2 (1994)); Missouri (§ 565.030 R.S.Mo. (2001)); New York (NY CLS CPL § 400.27 (1995)).

mentally retarded, they disagree about how this requirement should be defined. Eight of the states[9] specifically require a showing of "significant" or "substantial" deficits or limitations in adaptive functioning or behavior, but the other ten states[10] simply require a showing of "deficits" or "limitations" in adaptive functioning or behavior. Washington[11] defines "adaptive behavior" as "the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age." Expanding on Washington's definition, Arizona[12] defines "adaptive behavior" as "the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant's age and cultural group." Very similarly,

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9 Arizona (A.R.S. § 13-703.02(J)(2) (2001)); Arkansas (Ark. Stat. Ann. § 5-4-618(a)(1)(A) (1993)); Colorado (C.R.S. § 16-9-401(2) (1993)); Indiana (IN ST 35-36-9-2(2) (1994)); Kentucky (KRS § 532.130(2) (1990)); Missouri (§ 565.030.6 R.S.Mo. (2001)); North Carolina (N.C.G.S.A. § 15A-2005(a)(1)(a) (2001)); South Dakota (SDCL § 23A-27A-26.2 (2000)).

10 Connecticut (C.G.S.A. § 1-1g(a) (2001)); Florida (West's F.S.A. § 921.137(1) (2001)); Georgia (O.C.G.A. § 17-7-131(a)(3) (1988)); Kansas (K.S.A. § 76-12b01(d) (1994)); Maryland (Md. Ann. Code art. 27, § 412(f)(3) (1989)); Nebraska (R.R.S. Neb. § 28-105.01(3) (1998)); New Mexico (N.M. Stat. Ann. § 31-20A-2.1(A) (1991)); New York (NY CLS CPL § 400.27(12)(e) (1995)); Tennessee (Tenn. Code. Ann. § 39-13-203(a)(2) (1990)); Washington (WA ST § 10.95.030(2)(a) (1993)).

11 Washington (WA ST § 10.95.030(2)(d) (1993)).

12 Arizona (A.R.S. § 13-703.02(J)(1) (2001)).

Connecticut[13] defines "adaptive behavior" as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for the individual's age and cultural group." Further expanding that basic definition, Florida[14] defines "adaptive behavior" as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." Similarly, Kansas[15] defines "adaptive behavior" as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of that person's age, cultural group, and community."

Missouri and North Carolina, however, have adopted definitions of adaptive functioning or adaptive behavior that are strikingly different from the definitions found in the statutes of Washington, Arizona, Connecticut, Florida, and Kansas. Missouri's definition[16] of mental retardation specifies that there must be a showing of "continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work." North Carolina's statute[17] specifies that

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13 Connecticut (C.G.S.A. § 1-1g(b) (2001)).

14 Florida (West's F.S.A. § 921.137(1) (2001)).

15 Kansas (K.S.A. § 76-12b01(a) (1994)).

16 Missouri (§ 565.030.6 R.S.Mo. (2001)).

17 North Carolina (N.C.G.S.A. § 15A-2005(a)(1)(b) (2001)).

"significant limitations in adaptive functioning" means "significant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills." The remaining eleven states[18] have not set forth a definition of "adaptive functioning" or "adaptive behavior" in their statutes. Thus, an examination of these eighteen statutes clearly reveals that there is no consensus among these states with respect to how the "adaptive functioning" or "adaptive behavior" element should be understood and defined within a definition of mental retardation.

In his brief, Atkins explains that the third "essential" element in a definition of mental retardation would be that the mental retardation must manifest itself or become apparent during the "developmental period." (Brief for Pet. at 20-21) Sixteen of the eighteen states[19] do have a version of this element, but as with the first two elements, these states disagree about how this element

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18 Arkansas (Ark. Stat. Ann. § 5-4-618 (1993)); Colorado (C.R.S. § 16-9-401 (1993)); Georgia (O.C.G.A. § 17-7-131 (1988)); Indiana (IN ST 35-36-9-6 (1994)); Kentucky (KRS § 532.130 (1990)); Maryland (Md. Ann. Code art. 27, § 412 (1989)); Nebraska (R.R.S. Neb. § 28-105.01 (1998)); New Mexico (N.M. Stat. Ann. § 31-20A-2.1 (1991)); New York (NY CLS CPL § 400.27 (1995)); South Dakota (SDCL § 23A-27A-26.1 (2000)); Tennessee (Tenn. Code. Ann. § 39-13-203 (1990)).

19 As discussed above, the requirement that an individual's mental retardation manifest itself during the "developmental period" is absent from the definition of mental retardation set forth in the Nebraska (R.R.S. Neb. § 28-105.01(3) (1998)) and New Mexico (N.M. Stat. Ann. § 31-20A-2.1(A) (1991)) statutes.

should be understood and defined. Ten of the states[20] require a showing that an individual's mental retardation manifested itself before that individual attained the age of eighteen to deem that individual mentally retarded. One state[21] specifies that an individual's mental retardation must become apparent during "the developmental period, but no later than age eighteen." Two states[22] specify that an individual's mental retardation must become apparent before he or she attains the age of twenty-two. Finally, three other states[23] require that an individual's mental retardation manifest itself or become apparent during the "development period," but unlike the thirteen states discussed above, these states neither define what is meant by the "developmental period" nor set forth any specific age by which an individual's mental retardation must become apparent. Thus, an examination of these statutes fails to reveal a consensus among these states with respect to how the "developmental period" element,

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20 Arizona (A.R.S. § 13-703.02(J)(2) (2001)); Connecticut (C.G.S.A. § 1-1g(b) (2001)); Florida (West's F.S.A. § 921.137(1) (2001)); Kansas (K.S.A. § 76-12b01(d) (1994)); Missouri (§ 565.030.6 R.S.Mo. (2001)); New York (NY CLS CPL § 400.27(12)(e) (1995)); North Carolina (N.C.G.S.A. § 15A-2005(a)(1)(a) (2001)); South Dakota (SDCL § 23A-27A-26.1 (2000)); Tennessee (Tenn. Code. Ann. § 39-13-203(a)(3) (1990)); Washington (WA ST § 10.95.030(2)(e) (1993)).

21 Arkansas (Ark. Stat. Ann. § 5-4-618(a)(1)(A) (1993)).

22 Indiana (IN ST 35-36-9-2 (1994)); Maryland (Md. Ann. Code art. 27, § 412(f)(3) (1989)).

23 Colorado (C.R.S. § 16-9-401(2) (1993)); Georgia (O.C.G.A. § 17-7-131(a)(3) (1988)); Kentucky (KRS § 532.130(2) (1990)).

if included within a definition of mental retardation, should be understood and applied.

B. The Eighteen States Sharply Disagree About The Proper Burden Of Proof That An Individual Must Satisfy In Order To Establish That He Or She Is Mentally Retarded.

An analysis of the relevant statutes in each of these states also reveals that the states sharply disagree with respect to the proper burden of proof that an individual must satisfy before the individual can be deemed mentally retarded. Nine of the eighteen states[24] specify that an individual has the burden of proving mental retardation by a preponderance of the evidence. Four of the states[25] specify that an individual has the burden of proving his or her mental retardation by clear and convincing evidence, and one state[26] employs the beyond-a-reasonable-doubt-standard. In addition, North Carolina[27] mandates that an individual must establish his

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24 Arkansas (Ark. Stat. Ann. § 5-4-618(c) (1993)); Maryland (Md. Ann. Code art. 27, § 412(g)(1) (1989)); Missouri (§ 565.030.4(1) R.S.Mo. (2001)); Nebraska (R.R.S. Neb. § 28-105.01(5) (1998)); New Mexico (N.M. Stat. Ann. § 31-20A-2.1(C) (1991)); New York (NY CLS CPL § 400.27(12)(a) (1995)); South Dakota (SDCL § 23A-27A-26.3 (2000)); Tennessee (Tenn. Code. Ann. § 39-13-203(c) (1990)); Washington (WA ST § 10.95.030(2) (1993)).

25 Arizona (A.R.S. § 13-703.02(F) (2001)); Colorado (C.R.S. § 16-9-402(2) (1993)); Florida (West's F.S.A. § 921.137(4) (2001)); Indiana (IN ST 35-36-9-4(b) (1994)).

26 Georgia (O.C.G.A. § 17-7-131(c)(3) (1988)).

27 North Carolina (N.C.G.S.A. § 15A-2005(2)(c) (2001)).

or her mental retardation by clear and convincing evidence if he or she raises the issue at a pre-trial hearing about the issue before a trial court. The North Carolina statute[28] also provides, however, that, if the trial court determines that an individual is not mentally retarded, he or she may introduce evidence of mental retardation during the sentencing hearing, and in such a scenario, he or she must demonstrate mental retardation to the jury only by a preponderance of the evidence. Finally, the remaining three states[29] do not specify what burden of proof an individual must satisfy before he or she can be deemed mentally retarded. An examination of these eighteen statutes, therefore, fails to reveal a consensus among these states with respect to the proper burden of proof that an individual must satisfy before he or she can be deemed mentally retarded.

C. The Eighteen States Disagree About Whether The Trial Court Or The Jury Should Be Responsible For Determining If An Individual Is Mentally Retarded And About The Proper Time During A Criminal Proceeding For That Determination To Be Made.

A comparison of the statutes from these eighteen states illustrates that they differ significantly with respect to the issue of whether the trial court or the jury should be responsible for determining if an individual is mentally retarded and also with respect to the issue of

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28 North Carolina (N.C.G.S.A. § 15A-2005(2)(e) and (f) (2001)).

29 Connecticut (C.G.S.A. § 53a-46a (2001)); Kansas (K.S.A. § 21-4623 (1994)); Kentucky (KRS § 532.135 (1990)).

when, during the course of a criminal proceeding, such a decision should be made. Appendix of State Authorities, at 1a-7a.

More specifically, eight states[30] provide that the trial court may or must conduct a pre-trial hearing on the issue of the defendant's alleged mental retardation and determine whether the defendant is, in fact, mentally retarded. Three states[31] specify that the determination of whether the defendant is mentally retarded may or must be made during the trial phase of the proceedings by the trier of fact, and three other states[32] mandate that this determination be made by the trial court at a pre-sentencing hearing. In addition, four states[33] specify that this determination may or must be made by the trial court during the sentencing phase of the proceedings.

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30 Arizona (A.R.S. § 13-703.02(A), (F), and (G) (2001)); Arkansas (Ark. Stat. Ann. § 5-4-618(d)(2) (1993)); Colorado (C.R.S. § 16-9-402(1) and (2) (1993)); Indiana (IN ST 35-36-9-5 (1994)); Kentucky (KRS § 532.135(1) and (2) (1990)); Missouri (§ 565.030.5 R.S.Mo. (2001)); North Carolina (N.C.G.S.A. § 15A-2005(c) and (e) (2001)); South Dakota (SDCL § 23A-27A-26.3 (2000)).

31 Georgia (O.C.G.A. § 17-7-131(c)(3) (1988)); Tennessee (Tenn. Code. Ann. § 39-13-203(c) and (e) (1990)); Washington (WA ST § 10.95.030(2) (1993)).

32 Kansas (K.S.A. § 21-4623(a) and (b) (1994)); Nebraska (R.R.S. Neb. § 28-105.01(5) (1998)); New Mexico (N.M. Stat. Ann. § 31-20A-2.1(C) (1991)).

33 Arkansas (Ark. Stat. Ann. § 5-4-618(d)(2) (1993)); Connecticut (C.G.S.A. § 53a-46a(h)(2) (2001)); Maryland (Md. Ann. Code art. 27, § 412 (1989)); North Carolina (N.C.G.S.A. § 15A-2005(c) (2001)).

The remaining two states,[34] Florida and New York, specify that the determination of whether the defendant is mentally retarded should be made by the trial court after the jury issues an advisory sentence to the trial court, but in the case of New York, the trial court must conduct a hearing on the mental retardation issue before the sentencing phase but can issue its ruling only after the jury submits its advisory sentencing recommendation. An examination of these statutes establishes that there is no consensus among these states with respect to the issue of whether the trial court or the jury should determine if an individual is mentally retarded and with respect to when, during the course of a criminal proceeding, such a decision should be made.

D. The Eighteen States Disagree About Whether All Or Only Certain Mentally Retarded Individuals Should Be Protected By These Statutes.

A careful examination of the relevant statutes in each of these eighteen states further reveals that the states sharply disagree with one another on the subject of whether the statutes should be applied prospectively or retroactively or, in other words, whether the statutes should be applied to individuals convicted before the effective date of these statutes. Nine states[35] expressly

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34 Florida (West's F.S.A. § 921.137(4) (2001)); New York (NY CLS CPL § 400.27(12)(a) and (c) (1995)).

35 Arizona (A.R.S. § 13-703.02(I) (2001)); Florida (West's F.S.A. § 921.137(8) (2001)); Indiana (IN ST 35-36-9-6 (1994)); Kansas (K.S.A. § 21-4631(c) (1994)); Kentucky (KRS § 532.140(3) (1990)); Maryland (Md. Ann. Code art. 27, § 412 (1989)); Missouri (§ 565.030.7 R.S.Mo. (2001)); New York (NY CLS CPL § 400.27 (1995)); Tennessee (Tenn. Code.

specify that their statutes are to be applied prospectively only. Given Arkansas case law, it is probable that the statute prohibiting the execution of the mentally retarded in Arkansas also would be interpreted to apply prospectively.[36] Two other states[37] specify that an individual who was convicted before the effective date of the statute prohibiting or restricting the execution of the mentally retarded has a certain amount of time to file a

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Ann. § 39-13-203 (1990)) (*See Van Tran v. State*, 2001 WL 1538508, at *5-8 (Tenn. Dec. 4, 2001)) (held that the statute prohibiting the execution of the mentally retarded does not apply retroactively to individuals sentenced to death before the effective date of the statute).

[36] Arkansas (Ark. Stat. Ann. § 5-4-618 (1993)). Although the Arkansas Supreme Court has not expressly resolved this issue, the general rule in Arkansas is that "all legislation is presumed to apply prospectively unless the legislature expressly declares, or necessarily implies by the language used, an intent to give a statute retroactive effect." *City of Cave Springs v. City of Rogers*, 37 S.W.3d 607 (Ark. 2001). Because the Arkansas statute is silent on this particular issue, it is likely that the courts in Arkansas would determine that this general rule applies and would, therefore, presume that the legislature intended for this statute to apply prospectively only.

37 Nebraska (R.R.S. Neb. § 28-105.01(4) (1998)) ("Within one hundred twenty days after July 15, 1998, a convicted person sentenced to the penalty of death prior to July 15, 1998, may bring a verified motion...requesting a ruling that the penalty of death be precluded...and that the sentence be vacated."); North Carolina (N.C.G.S.A. § 15A-2006(2) (2001)) ("A motion seeking appropriate relief from a death sentence on the ground that the defendant is mentally retarded, shall be filed: (a) On or before January 31, 2002, if the defendant's conviction and sentence of death were entered prior to October 1, 2001.")

motion requesting a ruling that the penalty of death be precluded because he or she is mentally retarded. In other words, the statutes in Nebraska and North Carolina are retroactive only for a certain limited amount of time, and once that period of time expires, the application of these statutes will become prospective.

One state,[38] however, expressly requires that its statute be applied retroactively. More specifically, Georgia courts have determined that Georgia's statute prohibiting the execution of the mentally retarded must be applied retroactively to individuals convicted before the effective date of the statute. *Fleming v. Zant*, 386 S.E.2d 339 (Ga. 1989). Finally, the statutes in the five remaining states[39] are completely silent on the issue of whether they should be applied prospectively or retroactively. An examination of these eighteen statutes, therefore, demonstrates that there is no consensus among these states with respect to the issue of whether these statutes must be applied prospectively or retroactively.

Moreover, the fact that nine or ten states require that their statutes be applied prospectively only is instructive because it reveals that these states have not, in fact, prohibited the execution of all mentally retarded individuals. Instead, these states have only prohibited the execution of those mentally retarded capital murderers who are convicted and receive a death sentence

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38 Georgia (O.C.G.A. § 17-7-131 (1988)).

39 Colorado (C.R.S. § 16-9-402 (1993)); Connecticut (C.G.S.A. § 53a-46a (2001)); New Mexico (N.M. Stat. Ann. § 31-20A-2.1 (1991)); South Dakota (SDCL § 23A-27A-26.1 (2000)); Washington (WA ST § 10.95.030 (1993)).

after the effective date of the state statute addressing the execution of the mentally retarded. In addition, it should be noted that one state, New York, has even included an exception to its general rule prohibiting the execution of the mentally retarded. In its statute, New York provides that "[i]n the event that...the killing occurred while the defendant was confined or under custody in a state correctional facility or local correctional institution, and a sentence of death is imposed, such sentence may not be set aside...upon the ground that the defendant is mentally retarded." NY CLS CPL § 400.27(12)(d) (1995). An analysis of these eighteen statutes, therefore, establishes that there is not even a consensus among these states with respect to the issue of whether the ban on the execution of the mentally retarded should apply to all or only certain mentally retarded capital murderers.

E. Conclusion.

As in *Penry*, the question presented here is "whether the Eighth Amendment *categorically prohibits* [Atkins]'s execution [assuming that] he is mentally retarded." *Penry v. Lynaugh*, 492 U.S. 302, 307 (1989) (emphasis added). Moreover, consistent with its previous evaluation of the issue, in order to resolve the question favorably to Atkins, this Court must find the existence of "an emerging national consensus" against the execution of the mentally retarded. *Id.* at 334-35. Plainly, there is no "emerging national consensus" favoring categorical prohibition of the execution of the mentally retarded. A "categorical prohibition" would be one without exceptions, conditions, or qualifications. *See* Webster's New International Dictionary Unabridged (3rd ed. 1993) (defining categoric as "[a]bsolute, unqualified"). *See also Stanford v. Kentucky*, 492 U.S. 361, 375-76 (1989) (plurality opinion) (stating the "[t]he application of [an individualized

sentencing] system to [17 and 18 year olds] can be declared constitutionally inadequate only if there is a consensus, not that 17 or 18 is the age which most persons, or even almost all persons, achieve sufficient maturity to be held fully responsible for murder; but that 17 or 18 is the age before which *no one* can reasonably be held fully responsible"). Atkins's reliance on the eighteen statutes discussed above to support his contention of an "emerging national consensus" fails. As conclusively demonstrated, each of the statutes contains various exceptions, qualifications, and conditions, which differ from state to state. The statutes do not, therefore, support the conclusion that the Eighth Amendment categorically prohibits execution of the mentally retarded.

II. SOCIETY'S EVOLVING STANDARDS OF DECENCY, EVIDENT THROUGH THE LEGISLATIVE ENACTMENTS OF THE STATES, DO NOT WARRANT GRANTING THE RELIEF REQUESTED BY ATKINS.

In the previous section of this brief, *amici* set forth the legislative enactments that have been passed in those states that have specific statutes dealing with mental retardation and the imposition of the death penalty. In addition to these statutes, the Court should be cognizant of those states, such as Alabama, that address this issue through the use of *Penry*-compliant sentencing schemes.[40]

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[40] For example, in Alabama, a capital defendant may assert the issue of mental retardation through the "mental disease or defect" defense, ALA. CODE § 13A-3-1, through two statutory mitigating circumstances, ALA. CODE §§ 13A-5-51(2) and (6), and by presenting it as a non-statutory mitigating circumstance. ALA. CODE § 13A-5-52.

An examination of these legislative enactments is the only proper way for this Court to determine the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). As the Court noted in *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (plurality opinion), public opinion polls and the views of interest groups do not determine these cases, but rather, "[a] revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition on all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved." *See also Harmelin v. Michigan*, 501 U.S. 957, 988 (1990) (plurality opinion) ("The members of the Michigan Legislature, and not we, know the situation on the streets of Detroit.").

Historical events demonstrate that this Court is not in the best position to take the pulse of American society, absent legislative evidence. For example, in *Furman v. Georgia*, 408 U.S. 238 (1972), this Court struck down the death penalty despite the fact that forty-one states, the District of Columbia, and other federal jurisdictions had legislation authorizing capital punishment. *Id.* at 341 (Marshall, J. concurring). Four years later, this Court admitted that it erroneously determined the level of evolution reached by society, noting "it is now evident that a large proportion of American society continues to regard [capital punishment] as an appropriate and necessary criminal sanction." *Gregg*, 428 U.S. 153, 179 (1976).

Courts in Massachusetts and California learned the importance of looking at legislation to determine society's standards of decency, as well. Less than nine months after the California Supreme Court struck down capital punishment "in the light of contemporary standards," in

People v. Anderson, 493 P.2d 880, 887 (Cal. 1972), voters in California went to the polls and amended their state constitution to explicitly allow for capital punishment. *Constitution of California of 1879*, Art. 1, § 27 (Added Nov. 7, 1972). Likewise, when the Supreme Judicial Court of Massachusetts struck down capital punishment based on "contemporary standards," in *District Attorney for the Suffolk District v. Watson*, 411 N.E.2d 1274 (Mass. 1980), society rejected the court's interpretation of its will by amending the constitution to allow for capital punishment. MASS. GEN. LAWS CONST., Pt. 1, Art. 26 (Amended 1982).

Thus, whereas Atkins's brief devotes no portion of his argument to discussing the actual statutes that have been passed, this Court should not concern itself with any considerations other than what the current legislation indicates about society's standards of decency. To act without considering current legislation nationwide, including the vastly different approaches, procedures, and definitions employed by each state, would be to decide this issue in a manner that does not come close to representing contemporary standards.

Perhaps Atkins avoids discussing the details of each of the statutes addressing capital punishment and mental retardation because there is simply no national consensus as to what mental retardation is or at what point it negates a capital murderer's responsibility. Each state that currently authorizes capital punishment takes active steps to ensure that the issue of mental retardation is addressed. Despite this fact, not every state agrees with what mental retardation is or when it should operate to negate a capital murderer's responsibility or culpability. Nebraska and New Mexico, for example, do so by allowing a finding of mental retardation even where

the condition does not manifest itself during the defendant's developmental period. Kansas's mental retardation statute, like Alabama's statutory mitigation approach to this issue, requires the defendant to demonstrate that his or her mental retardation "substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law." K.S.A. § 76-12b01(d); § 21-4623(e).

As noted above, six states require an intelligence quotient of seventy (70) or below to establish significantly subaverage intellectual functioning. Two states have set forth an intelligence quotient of sixty-five (65) or below to meet this element of mental retardation. Five states do not set forth any definition of this element. Additional states set forth rebuttable presumptions based on whether an individual's intelligence quotient is seventy (70) or below.

The states also disagree on what constitutes a deficit in adaptive functioning. As shown above, eight states require a showing of "significant" or "substantial" deficits or limitations in adaptive functioning, but the other ten require only a showing of "deficits" or "limitations." In states, such as Alabama, that use a statutory mitigation approach, the requirement is to show either that the defendant's capacity to "appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired" or that the offense was committed while the defendant was under the influence of

"extreme mental or emotional distress." ALA. CODE §§ 13A-5-51(2) and (6).[41]

The survey of current legislation, above, sets forth many additional differences in the various statutes of the states that have specifically dealt with capital punishment and mental retardation. This is in addition to the differences among those states that have elected to adopt only *Penry*-compliant mitigation schemes. These differences, however, are important because they make one issue especially clear: although the nation, as a whole, is examining (or re-examining) the issue of capital punishment and mental retardation, there is simply no national consensus that warrants either the adoption of one uniform standard or an Eighth Amendment pronouncement by this Court.

Each state is addressing this issue in the manner dictated by its residents. The legislators of each state are normally never more than two years away from their previous or next elections. It is this frequent electoral interaction between society and its elected legislative bodies that makes the current legislation so important in this analysis. Further, the Court can see from the scope of the various legislation that has been enacted that society is expressing its standards of decency through the legislative process.

This fact, however, does not justify a finding that this Court must, today, hold that there is a set definition of mental retardation that must be imposed on all states that utilize capital punishment. Instead, this fact should

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[41] This is in addition to the ability of a defendant to introduce any evidence "that the defendant offers as a basis for life imprisonment without parole instead of death." ALA. CODE §§ 13A-5-52.

be viewed by the Court as an indication that each state continues to work toward improving its criminal justice system while addressing any concerns of contemporary values.

In *Johnson v. Louisiana*, 406 U.S. 356 (1972), this Court approved Louisiana's use of a majority vote requirement for criminal jury verdicts, as opposed to a requirement of unanimity.[42] In reaching this decision, this Court paid great deference to the Louisiana Legislature despite the fact that most states required unanimous verdicts. *Id.* at 365. In his concurring opinion, Justice Powell made the following particularly relevant observation:

> While the Civil War Amendments altered substantially the balance of federalism, it strains credulity to believe that they were intended to deprive the States of all freedom to experiment with variations in jury trial procedure. In an age in which empirical study is increasingly relied upon as a foundation for decision making, one of the more obvious merits of our federal system is the opportunity it affords each State, if its people so choose, to become a 'laboratory' and to experiment with a range of trial and procedural alternatives. Although the need for the innovations that grow out of diversity has always been great, imagination unimpeded by unwarranted demands for national uniformity is of special importance at a time when serious doubt exists as to the adequacy of our criminal

[42] Although *Johnson* did not involve capital punishment, it did involve an offense punishable at hard labor.

> justice system. The same diversity of local legislative responsiveness which marked the development of economic and social reforms in this country, if not barred by an unduly restrictive application of the Due Process Clause, might well lead to valuable innovations with respect to determining--fairly and more expeditiously--the guilt or innocence of the accused.

(footnote omitted) Justice Powell's remarks were based, in part, on Justice Brandeis's dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). As Justice Brandeis noted in that case, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.* (Brandeis, J., dissenting).

Today, each state is conducting its own experiment involving the mental retardation issue, so it is simply premature to conclude that there is a national uniform standard setting forth a definition of mental retardation and under what circumstances that condition would excuse a convicted capital murderer from execution. Even Atkins notes in his brief that many of these statutes have been enacted in the past several years, meaning that any attempt to fashion a national standard from such legislation would require adopting, in some instances, laws and procedures that are unproved. (Brief for Pet. at 38-39)

For this reason, this Court should reject Atkins's argument and allow each state—those with specific statutes addressing mental retardation in the context of

capital punishment as well as those states that have opted for *Penry* compliant schemes—to continue to respond to its residents' concerns through legislation. All states that authorize capital punishment have statutes or rules that address whether a mentally retarded individual should be executed. All states should, therefore, be allowed to continue exploring the issue of when mental retardation should be a factor negating a capital defendant's actual responsibility and culpability as opposed to when it is, as it is in Atkins's case, merely an attempt to avoid execution. Thus, the Court should decline to set a uniform national standard or to grant Atkins the relief requested.

CONCLUSION

The judgment of the Supreme Court of Virginia should be affirmed.

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APPENDIX OF STATE AUTHORITIES

Arizona

"If the state files a notice of intent to seek the death penalty, the court shall appoint a prescreening psychological expert in order to determine [t]he defendant's intelligence quotient [and the] expert shall submit a written report of the intelligence quotient determination to the court within ten days of the testing..."

"No less than thirty days after the...reports are submitted to the court and before trial, the trial court shall hold a hearing to determine if the defendant has mental retardation."

"If the trial court finds that the defendant has mental retardation, the trial court shall dismiss the intent to seek the death penalty, shall not impose a sentence of death on the defendant..." (A.R.S. § 13-703.02(A), (F), and (G) (2001)).

Arkansas

"Prior to trial, the court shall determine if the defendant is mentally retarded. If the court determines that the defendant is not mentally retarded, the defendant may raise the question of mental retardation to the jury for determination *de novo* during the sentencing phase of the trial." (Ark. Stat. Ann. § 5-4-618(d)(2) (1993)).

Colorado

"Any defendant may file a motion with the trial court in which the defendant may allege that such defendant is a mentally retarded defendant. Such motion shall be filed at least ninety days prior to trial."

"The court shall hold a hearing upon any motion filed pursuant to subsection (1) of this section and shall make a determination regarding such motion no later than ten days prior to trial." (C.R.S. § 16-9-402(1) and (2) (1993)).

Connecticut

"The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by special verdict...that at the time of the offense...the defendant was a person with mental retardation as defined in section 1-1(g)." (C.G.S.A. § 53a-46a(h)(2) (2001)).

Florida

"After a defendant who has given notice of his or her intention to raise mental retardation as a bar to the death sentence is convicted of a capital felony and an advisory jury has returned a recommended sentence of death, the defendant may file a motion to determine whether the defendant has mental retardation. Upon receipt of the motion, the court shall appoint two experts...who shall evaluate the defendant and report their findings to the court...At the final sentencing hearing, the court shall consider the findings of the court-appointed experts...If the court finds...that the defendant has mental retardation, the court may not order a sentence of death..." (West's F.S.A. § 921.137(4) (2001)).

Georgia

"The defendant may be found 'guilty but mentally retarded' if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is mentally retarded. If the court or jury should make such a finding, it shall so specify in its verdict." (O.C.G.A. § 17-7-131(c)(3) (1988)).

Indiana

"Not later than ten (10) days before the initial trial date, the court shall determine whether the defendant is a mentally retarded individual based on the evidence set forth at the hearing..." (IN ST 35-36-9-5 (1994)).

Kansas

"If...the county or district attorney has filed a notice of intent to request a separate sentencing proceeding to determine whether the defendant should be sentenced to death and the defendant is convicted of the crime of capital murder, the defendant's counsel...may request a determination by the court of whether the defendant is mentally retarded..."

"At the hearing, the court shall determine whether the defendant is mentally retarded." (K.S.A. § 21-4623(a) and (b) (1994)).

Kentucky

"At least thirty (30) days before trial, the defendant shall file a motion with the trial court wherein the defendant may allege that he is a seriously mentally retarded defendant and present evidence with regard thereto. The Commonwealth may offer evidence in rebuttal."

"At least ten (10) days before the beginning of the trial, the court shall determine whether or not the defendant is a seriously mentally retarded defendant..." (KRS § 532.135(1) and (2) (1990)).

Maryland

Richardson v. State, 598 A.2d 1, 3-4 (Md. App. 1990) (held that the issue of mental retardation is properly determined by the trier of fact at the sentencing stage of the proceedings, not pre-trial or pre-sentencing).

Missouri

"Upon written agreement of the parties and with leave of the court, the issue of the defendant's mental retardation may be taken up by the court and decided prior to trial without prejudicing the defendant's right to have the issue submitted to the trier of fact [as a mitigating circumstance,] as provided in subsection(4)." (§ 565.030.5 R.S.Mo. (2001)).

Nebraska

"For any convicted person who may be sentenced to the penalty of death on or after July 15, 1998, the court shall hold a hearing prior to any sentencing hearing...If the court finds...that the defendant is a person with mental retardation, the death penalty shall not be imposed. A ruling by the court that the evidence...does not preclude the death penalty...shall not restrict the defendant's opportunity to...argue that such evidence should be given mitigating significance." (R.R.S. Neb. § 28-105.01(5) (1998)).

New Mexico

"Upon motion of the defense requesting a ruling that the penalty of death be precluded under this section, the court shall hold a hearing, prior to conducting the sentencing proceeding...If the court finds, by a preponderance of the evidence, that the defendant is mentally retarded, it shall sentence the defendant to life imprisonment." (N.M. Stat. Ann. § 31-20A-2.1(C) (1991)).

New York

"Upon the conviction of a defendant for the offense of murder in the first degree..., the court shall...promptly conduct a hearing without a jury to determine whether the defendant is mentally retarded...The court shall defer

rendering any finding pursuant to this subdivision as to whether the defendant is mentally retarded until a sentence is imposed pursuant to this section."

"In the event the defendant is sentenced...to death, the court shall thereupon render a finding with respect to whether the defendant is mentally retarded. If the court finds the defendant is mentally retarded, the court shall set aside the sentence of death and sentence the defendant either to life imprisonment without parole or to a term of imprisonment..." (NY CLS CPL § 400.27(12)(a) and (c) (1995)).

North Carolina

"[T]he court may order a pretrial hearing to determine if the defendant is mentally retarded...If the court determines the defendant to be mentally retarded, the court shall declare the case noncapital, and the State may not seek the death penalty..."

"If the court does not find the defendant to be mentally retarded in the pretrial proceeding, upon the introduction of evidence of the defendant's mental retardation during the sentencing hearing, the court shall submit a special issue to the jury as to whether the defendant is mentally retarded...This special issue shall be considered and answered by the jury prior to the consideration of the aggravating or mitigating factors and the determination of sentence. If the jury determines the defendant to be mentally retarded, the court shall declare the case noncapital and the defendant shall be sentenced to life imprisonment." (N.C.G.S.A. § 15A-2005(c) and (e) (2001)).

South Dakota

"Not later than ninety days prior to the commencement of trial, the defendant may... apply for an order directing

that a mental retardation hearing be conducted prior to trial. If...the court finds reasonable cause to believe the defendant was mentally retarded, it shall promptly conduct a hearing without a jury to determine whether the defendant was mentally retarded. If the court finds after the hearing that the defendant was not mentally retarded at the time...of the offense, the court shall, prior to commencement of trial, enter an order so stating...If the court finds after the hearing that the defendant established mental retardation by a preponderance of the evidence, the court shall prior to the commencement of trial, enter an order so stating." (SDCL § 23A-27A-26.3 (2000)).

Tennessee

"The determination of whether the defendant was mentally retarded...shall be made by the court."

"If the issue...is raised at trial and the court determines that the defendant is not a person with mental retardation, the defendant shall be entitled to offer evidence...of diminished intellectual capacity as a mitigating circumstance..." (Tenn. Code. Ann. § 39-13-203(c) and (e) (1990)).

Washington

"In no case, however, shall a person be sentenced to death if the person was mentally retarded at the time the crime was committed... A diagnosis of mental retardation shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of mental retardation. The defense must establish mental retardation by a preponderance of the evidence and the court must make a finding as to the existence of mental retardation." (WA ST § 10.95.030(2) (1993)).